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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROCHELLE JOYCE ASCHER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the Virginia courts apply the presumption in civil securities law created by the Supreme Court in *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945 (1990)—that every loan is a "security"—and make this a mandatory presumption in a criminal prosecution involving political loans and alleged securities fraud?

2. May the Virginia courts withdraw as an element of the crime of securities fraud the "knowledge" that the notes "sold" were "securities" in contradiction of the express language found in the securities statute requiring that the conduct be done "knowingly," as well as similar language found in the prosecution's bill of particulars?

3. May the Virginia courts withdraw an element of the crimes charged, and otherwise confound a jury by instructing them that if the accused participated in any way in the "sale" of a "security," she was liable for conspiracy and for intent to commit securities fraud whether or not she contemplated such crimes beforehand?

I. TABLE OF CONTENTS

	Page
I. TABLE OF CONTENTS	ii
II. TABLE OF AUTHORITIES	iv
III. REFERENCE	1
IV. JURISDICTIONAL STATEMENT	1
A. INSTRUCTIONS AND DECISION SOUGHT TO BE REVIEWED	1
B. STATUTORY PROVISIONS CONFERRING JURISDICTION	2
C. REHEARINGS DENIED	3
V. CONSTITUTIONAL PROVISIONS, TREATIES, ETC.	3
VI. STATEMENT OF THE CASE	3
VII. THE QUESTIONS PRESENTED	11
1. THE VIRGINIA COURTS IMPERMISSIBLY CREATED A MANDATORY PRESUMPTION THAT EVERY LOAN IS A "SECURITY"	11
2. THE VIRGINIA COURTS MAY NOT WITHDRAW AS AN ELEMENT OF THE CRIME OF SECURITIES FRAUD THE "KNOWLEDGE" THAT THE NOTES "SOLD" WERE "SECURITIES" IN CONTRADICTION OF THE EXPRESS LANGUAGE FOUND IN THE SECURITIES STATUTE REQUIRING THAT THE CONDUCT BE DONE "KNOWINGLY," AND IN THE PROSECUTION'S BILL OF PARTICULARS	23

3. THE VIRGINIA COURTS MAY NOT WITHDRAW AN ELEMENT OF THE CRIMES CHARGED, AND OTHERWISE CONFOUND A JURY BY INSTRUCTING THEM THAT IF THE ACCUSED PARTICIPATED IN ANY WAY IN THE "SALE" OF A "SECURITY," SHE WAS LIABLE FOR CONSPIRACY AND FOR INTENT TO COMMIT SECURITIES FRAUD WHETHER OR NOT SHE CONTEMPLATED SUCH CRIMES BEFOREHAND 26

CONCLUSION 29

II. TABLE OF AUTHORITIES

CASES:	Page
American Fletcher Mortgage Co. v. U.S. Steel Credit Corp., 635 F.2d 1247 (7th Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S. Ct. 1982, 68 L. Ed. 2d 300 (1981)	15
Ascher v. Commonwealth, 12 Va. App. 1105, 408 S.E.2d 906 (1991)	1,11
Bachellar v. Maryland, 397 U.S. 564, 90 S. Ct. 1312, 25 L. Ed. 2d 570 (1970)	28
Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350 (1946)	17,29
Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)	29
Carpenters v. United States, 330 U.S. 395, 67 S. Ct. 775, 91 L. Ed. 973 (1947)	16
Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)	28
Cramer v. United States, 325 U.S. 1, 65 S. Ct. 918, 89 L. tEd. 1441 (1945)	28
Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)	16
In Re Epic Mortgage Insurance Litigation, 701 F. Supp. 1192 (E.D. Va. 1988)	13,14,15
Exchange National Bank v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976)	18
Floyd v. Commonwealth, 219 Va. 575, 249 S.E.2d 171 (1978)	27
Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985)	12,17
Futura Development Corp. v. Centex Corp., 761 F.2d 33 (1st Cir. 1985), *aff'd*, 813 F.2d 403 (4th Cir. 1986), *cert. denied*, 479 U.S. 1065, 107 S. Ct. 951, 93 L. Ed. 2d 1000 (1987)	14

Table of Authorities Continued

	Page
Gottlieb v. Commonwealth, 126 Va. 807, 101 S.E.2d 872 (1920)	24
Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984)	27
Hopt v. Utah, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884)	18
Iacobucci v. Universal Bank, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,075 (S.D.N.Y. Jan. 28, 1991)	19
Lambert v. Commonwealth, 6 Va. App. 745, 367 S.E.2d 745 (1988)	24
Landreth Timber Co. v. Landreth, 471 U.S. 681, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985)	18
Lawler v. Gilliam, 569 F.2d 1283 (4th Cir. 1978)	13
Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969)	28
Lynch v. Commonwealth, 131 Va. 762, 109 S.E. 427 (1921)	24
Marine Bank v. Weaver, 455 U.S. 551, 102 S. Ct. 1220, 71 L. Ed. 2d 409 (1982)	5,23
McVay v. Western Plains Service Corp., 823 F.2d 1395 (10th Cir. 1987)	15,22
National Bank of Commerce of Dallas v. All American Assurance Co., 583 F.2d 1295 (5th Cir. 1978)	15
Oliver v. Bostetter, 426 F. Supp. 1082 (D. Md. 1977)	13
Pollock v. Commonwealth, 217 Va. 411, 229 S.E.2d 858 (1976)	13
Premier Microwave Corp. v. Comtech Telecommunications Corp., [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,789 (S.D.N.Y. Jan. 28, 1991)	19

Table of Authorities Continued

	Page
Principe v. McDonald's Corp., 463 F. Supp. 1149 (E.D. Va. 1979)	13
Reves v. Ernst & Young, 494 U.S. 56, 110 S. Ct. 945 (1990)	1,11,12,18,19,20,21,22
SEC v. W.J. Howey Co., 328 U.S. 293, 66 S. Ct. 1100 (1946)	5,13,15,18
Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.ED.2d 39 (1979)	12,16
Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031 (1945)	25,26
South Carolina National Bank v. Darmstadter, 622 F. Supp. 226 (D.S.C. 1985)	14
State v. Tober, 826 P.2d 1199, 96 Ariz. Adv. Rep. 91 (Ariz. App. 1991)	12,25
Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931)	28
Tcherepnin v. Knight, 389 U.S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967)	12
United Housing Foundation v. Forman, 421 U.S. 837, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975)	12,16
United States v. Alvarez, 610 F.2d 1250 (5th Cir. 1980)	27
United States v. Bright, 630 F.2d 804 (5th Cir. 1980)	27
United States v. Illinois Central Railroad Co., 303 U.S. 239, 58 S. Ct. 533 (1938)	24
United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977)	16
United States v. Nelson, 599 F.2d 714 (5th Cir. 1979)	27
United States v. Rubinson, 543 F.2d 951 (2d Cir. 1976), *cert. denied*, 429 U.S. 850 (1976).]	25

Table of Authorities Continued

	Page
United States v. Suarez, 608 F.2d 584 (5th Cir. 1979)	27
Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942)	28
In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	12,17
Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957)	28
Zuniga v. Commonwealth, 7 Va. App. 523, 375 S.E.2d 381 (Va. App. 1988)	27
STATUTES:	
Title 28 U.S.C. § 1257	2
Title 15 U.S.C. § 77b, 77x	2
Va. Code Ann. § 13.1-501(b), 504, 507	2
Va. Code Ann. § 13.1-520A	2,4
7B, Uniform Laws Ann., §§ 401, 409	2

III. REFERENCE

Ascher v. Commonwealth, 12 Va.App. 1105, 408 S.E.2d 906 (1991)

IV. JURISDICTIONAL STATEMENT[1]

A. INSTRUCTIONS AND DECISION SOUGHT TO BE REVIEWED

The Virginia Court of Appeals upheld Petitioner's securities fraud conviction entered on June 19, 1991 (App. 35a *et seq.*)[2] in a reported opinion filed on August 31, 1991, *Ascher v. Commonwealth*, 12 Va.App. 1105, 408 S.E.2d 906 (1991) (App. 1a *et seq.*), deciding:

> (a) that there is a mandatory presumption in a securities fraud prosecution that every "note"—even one involving a political loan—is a "security" (App. 17a-25a), citing in support this Court's decision in *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945 (1990), a civil securities suit decided by this Court ten months *after* Petitioner's state conviction; and
>
> (b) that the trial court may instruct a jury that, if the accused participated in any way in the "sale" of a "security," she is liable for conspiracy and for intent to commit securities fraud whether or not she contemplated the commission of these crimes beforehand (App. 25a-27a, 104a).

The Virginia Court of Appeals also refused to permit an appeal on whether Petitioner had to "know" that these

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[1] The Commonwealth of Virginia is represented in this matter by the Honorable John Russell, Senior Assistant Attorney General, Office of the Attorney General of Virginia, 101 North Eighth Street, Richmond, Virginia 23219.

[2] References to the Appendix shall be hereafter referred to as "App. 00a"; references to the Appendix in the state court shall be "Va. App. 00."

"notes" were securities (App. 98a, 33a). The Supreme Court of Virginia then refused to permit her an appeal (App. 29a).

B. STATUTORY PROVISIONS CONFERRING JURISDICTION

This Court's jurisdiction is invoked in accordance with Title 28, United States Code, Section 1257 as this petition is concerned with the rights, privileges, and immunities set up and claimed by Petitioner in the Virginia trial court and preserved on appeal under the Due Process Clause of the Fourteenth Amendment, by which Clause it is denied to the diverse states any power to deprive an accused of liberty unless the prosecution proves beyond a reasonable doubt every element of a charged offense.

In accordance with Rule 10.1 (Considerations Governing Review on Writ of Certiorari) of the Rules of the Supreme Court of the United States, Petitioner respectfully suggests as further grounds that:

(a) the Virginia Court of Appeals' decision at issue here addresses an important question of federal law (the mandatory presumption that every note is a security in a criminal prosecution, purportedly in accord with this Court's decision in *Reves*), a question not yet settled by this Court.

(b) the Arizona state court decision, *State v. Tober*, 826 P. 2d 1199, 96 Ariz. Adv. Rep. 91 (Ariz. App. 1991), holding that a state securities prosecution that considered every note a security and found it unnecessary for the accused to know the notes were securities violated constitutional due process, a decision that plainly conflicts with the Virginia Court of Appeals's decision at issue here.

(c) the Virginia Court of Appeals' decision decided a federal question by withholding from the jury's consideration the elements of the crimes charged against the accused in conflict with applicable decisions of this Court.

C. REHEARINGS DENIED

The Court of Appeals denied Petitioner's request for a rehearing *en banc* on October 17, 1991 (App. 65a). The Supreme Court of Virginia denied Petitioner's request for an appeal on March 12, 1992 (App. 29a). The Supreme Court of Virginia denied Petitioner's request for a rehearing *en banc* on April 17, 1992, within 90 days of the filing of the instant petition.

V. CONSTITUTIONAL PROVISIONS, TREATIES, ETC.[3]

Virginia Code Sections 13.1-501, 13.1-502, 13.1-504, 13.1-507, 13.1-520, and 18.2-22
Title 15, United States Code, Sections 77b, and 77x
7B, Uniform Laws Ann., Sections 401, 409
Amendments to the United States Constitution: The First, Fifth, Sixth, and Fourteenth Amendments

VI. STATEMENT OF THE CASE

In February, 1987, Mrs. Rochelle Ascher, Petitioner herein, a fundraiser for political causes associated with political activist Lyndon H. LaRouche, Jr., was charged in eleven (11) counts with securities fraud (App. 67a-72a).

In August 1988, another count, conspiracy to commit securities fraud, was added by the prosecution (App. 66a).

At the conclusion of the three-month trial in April, 1989, the trial court dismissed counts 3, 5, and 6 for lack of venue in Loudoun County, Virginia.

The jury, challenged for its partiality because of the massive pre-trial publicity in opposition to LaRouche and

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[3] In accordance with the Rules of the Supreme Court, the constitutional and statutory provisions have been included in the Appendix.

his associates,[4] found Petitioner guilty on all nine counts they considered, and sentenced Petitioner, a first time offender, to an eighty-six year prison term. The trial court reduced this sentence on June 6, 1989 to ten years confinement in prison (App. 35a-39a).

The Indictment charged that Mrs. Ascher was, in effect, selling "securities" when, in addition to the contributions she solicited, she accepted "notes" or "evidence of indebtedness," that is, loans from LaRouche's supporters dedicated to funding LaRouche's various political undertakings. The prosecution charged her fraud consisted principally of withholding information that the LaRouche political organization was in a sorry financial state (Va. App. 2192, 2231).

In accordance with the state securities statute, Va. Code Ann. § 13.1-520A (App. 281a), the Indictment charged that Mrs. Ascher "*knowingly* and willfully" committed these various securities fraud offenses (App. 67a-72a).[5]

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[4] The trial court changed venue for each of Petitioner's co-defendants, citing the "extreme difficulty" encountered in seating Petitioner's jury, notably that 115 veniremen had to be examined in rural Loudoun County, a community saturated continuously from 1986 through Petitioner's trial in 1989 with prejudicial publicity against resident "political extremist" Lyndon LaRouche and his associates (App. 275a-277a). Petitioner Ascher argued in support of her motion to reduce the jury's sentence in June, 1989 that the prejudicial publicity meriting the transfer of every other case meant her jury was partial as further evidenced by the jury's unprecedented and disproportionate 86-year sentence.

[5] The Indictment charged that Petitioner did "*knowingly* and willfully":

— "offer and sell" unregistered securities (Count One),

— "transact business as an unregistered broker-dealer [for securities]" (Count Two), and

— did repeatedly participate "in the offer and sale of a security" (specifying in separate counts nine loans from seven individuals over a three year period) (Counts Three through Eleven) (App. 67a-72a). (Emphasis Supplied.)

The prosecution's Bill of Particulars further specified Petitioner knew she had to register herself to sell "securities," that is, "promissory notes" and "letters of indebtedness."[6]

Petitioner Ascher argued to the trial court—but was precluded from making the same or similar arguments to the jury—that she did not "know" that these political loans were "securities," much less that she purposefully avoided registering the notes or herself (App. 43a-46a, 58a-59a, 98a).

Petitioner further argued to no avail, in reliance on the prefatory language found in Virginia Code § 13.1-501 (App. 278a), that "the [political] context [in which these loans were made] . . . require[d]" they *not* be considered securities (App. 46a-55a, 57a, 61a-63a, 79a-85a, 105a, 258a). Petitioner cited authority that the purpose of this prefatory language was to confine the broad statutory definitions that followed. *Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S.Ct. 1220, 1223, 71 L.Ed.2d 409 (1982) (App. 81a). Petitioner invoked the contextual test enunciated in *SEC v. W.J. Howey Co.* 328 U.S. 293, 66 S.Ct. 1100, 1104 (1946)(the *Howey* test) that the political loans at issue were not "securities" *unless* the jury found the lender had "*invest*[*ed*] his money" *and* was "led to expect *profits*." (App. 81a, 82a-84a, and 85a). (Emphasis Supplied.)

It is material to this Petition, particularly because of the panel decision by the Virginia Court of Appeals, that

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[6] The Bill of Particulars provided that "the failure of the defendant [Ascher] to register [as a broker dealer of securities] was *knowing* and willful in that . . . her failure to do so [to register] was an effort to avoid scrutiny and detection by the State Corporation Commission ["S.C.C."] or law enforcement authorities in Virginia and other jurisdictions," and that "the failure to register either the notes [as securities] or the agents selling the notes [as broker dealers] was part of an overall scheme to defraud the purchasers of those notes. . ." (Emphasis Supplied.) *See* Commonwealth's Bill of Particulars, ¶¶ 2 (c) and 2 (d); App. 74a.

both parties adduced evidence at trial that the context of these loans was political and not an investment.

The evidence showed that witness-lenders, in the first instance, became LaRouche supporters following a chance conversation about politics across a card table covered with leaflets, festooned with hand drawn political posters, staffed by a LaRouche supporter, and found at some airport, post office, or shopping center (App. 153a-154a, 159a, 181a-182a, 203a, 207a, and 233a). In this and later conversations, the individual was urged to support LaRouche himself or some controversial political stand or to become politically active (to attend political rallies, lobby elected officials, support LaRouche candidates for elective office, or even to run himself for office) (App. 154a, 160a-162a, 205a, 213a-216a).

The evidence showed that each individual was usually encouraged to subscribe to various publications espousing LaRouche's views, and encouraged to contribute to one or more of the various LaRouche political causes, publication drives, or concededly cash-short entities. If a contribution could not be had, the individual was usually asked to lend money instead for these same politically motivated objectives. (App. 122a, 124a, 127a-128a, 131a, 166a, 186a, 188a, 194a, 198a, 205a-206a, 209a-211a, 216a).

The defense summoned witnesses to testify the funds they loaned were not an investment, nor given with any expectation of receiving a profit; these lenders were indisputably seeking to advance a political agenda; their testimony is summarized in the margins and reproduced in the Appendix.[7]

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[7] A. Dunn, a defense witness, said he loaned the LaRouche organizations money because "they [the LaRouche organizations] needed money and I knew that some money had been . . . taken out of their bank account [by federal authorities];" he loaned the funds at an unprofitably low rate, not knowing whether he would ever get it back,

The prosecution witnesses testified as to the non-investment character of their loans; their relevant testimony is also summarized in the margins and reproduced in the Appendix.[8]

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said he "d[id]n't look at that [loan] as an investment," stating, by way of explanation, that "a political contribution [sic] is notorious for not being [repaid]. . ." (App. 231a, 232a).

J. Hereford, a defense witness, made loans to the LaRouche organization "to help with the cash flow until funds could be recouped from the [government's] seizure [of funds] in Boston," and *not* as an investment (App. 236a-237a).

M. Fairchild, a defense witness, made a loan "to further the efforts of the organization," and "not in the sense of a financial investment," rather as "an investment in the future of America," and he later forgave his loan (App. 238a-239a, Va. App. 1949). S. Gregory, a defense witness, also made his loan "to help out the cause" (App. 258a).

H. Griffith, a defense witness, loaned funds to "support . . . the efforts to continue the strategic defense initiative and the efforts of the Fusion Energy Foundation", and not to make a financial investment, nor any profit for that matter, particularly since the loans he made were interest-free (App. 234a-235a). C. McCarthy, a defense witness, loaned the LaRouche organizations funds at zero percent interest, and later forgave her loans (App. 243a).

G. Eddleston, a defense witness, loaned money "to expand the subscription base and to put Mr. LaRouche on TV during the presidential campaign" and declared it was not a business investment, later forgiving his loans (App. 240a-241a).

R. Watson, a defense witness, "didn't intend to make any money on any of them [his loans]" and didn't consider them investments (App. 247a, 249a). Nor did R. Hull, a defense witness, consider his loan an investment (Va. App. 2002).

[8] Robert N. Ware, a witness for the prosecution, made a loan (Count Four) to the not-for-profit Fusion Energy Foundation to spread LaRouche's political message, and stated he plainly did not consider his loan an investment, "not *per se*." Mr. Ware forgave the outstanding balance due on his loans long before he testified at trial (Va. App. 1823; Tr. 3/9/89, at 149).

L. W. Burchett, the undercover police officer charged with inducing Petitioner Ascher to issue a note for a political loan and thereby engage in a "securities" transaction, swore he was prepared to lend money

Both sides also proffered expert testimony. The defense proffered the expert testimony of George Mason Law Professor Henry Butler that these political loans *were not* securities (App. 254a-255a). The prosecution proffered expert testimony by University of Virginia Law Professor M. T. Dooley that they *were* securities (App. 168a *et seq.*).

(Count Ten) "at a loss" and "as a favor" to the LaRouche organization, conceding it was "not a smart investment" (App. 129a-130a).

Dr. E. G. Allen, another prosecution witness, testified he loaned funds (Count 11) "because [he] supported the political position of the organization" (App. 194a). He conceded the funds he withdrew from his pension funds to make some loans had to "earn" interest lest he jeopardize his tax status, characterizing the interest earned as "nominal" (App. 195a). It was hardly an investment to loan other funds to publish a book called *Dope Inc.* from a bank credit line that cost him precisely the same interest rate he expected in "return" for his LaRouche loan (App. 188a-190a).

M. Cathleene Waddell, another prosecution witness, suffered a stroke and memory loss (aphasia) between making both contributions and loans (Counts 7, 8 and 9) and testifying about them at trial (App. 135a). She could not remember amounts, alternately failed to remember whether she gave or loaned funds, at one time saying she made $50,000 worth of contributions (App. 146a). She did not remember contributing to petitioner's defense fund (App. 149a) or discussing politics (App. 148a). She did, however, remember that she made some loans expecting *no* interest (App. 147a, 151a).

Mr. J. Herndon, a prosecution witness, said he borrowed money from a bank at sixteen percent and loaned it at a loss, at ten percent (App. 132a-134a). Mr. Cotterino, another prosecution witness, said he loaned his money at a loss, for 12% interest when the funds cost him 17%, conceding the loan "wasn't for [his] financial benefit," and made another loan at precisely the same interest rate it cost him to get the funds (App. 219a-220a, 223a-224a). Mr. G. Thompson, another prosecution witness, loaned funds at the same rate it cost him on his credit card to subsidize political television broadcasts (App. 165a-166a). Messrs. Hiatt and Newell, prosecution witnesses both, similarly loaned monies at the same rate charged on their credit cards or at a loss (App. 156a-158a, 212a, 214a-216a). Mr. E. L. Parker, another prosecution witness, said he expected *no* profit from his loan to pay for a political conference (App. 205a-206a). Lelia McMillan, another prosecution witness, made five (5) loans at 0% interest (Commonwealth Exs. W18A-18F).

The trial court, however, stated that the literal definition that a "note" or "evidence of indebtedness" was a security was plainly stated in the Code in Section 13.1-501(j) (App. 178a), and the trial court did not "understand why either side brought a law professor here to tell us what a security is" (App. 256a).

The trial court never appreciated that the context or purpose of the loan or the knowledge of the accused was material or relevant to the jury's deliberations.

The prosecution submitted an instruction containing the literal definition found in the statute (App. 93a); the trial court accepted that instruction. The prosecutor also submitted a "contextual" instruction stating each juror had to "examine the *substance* [not the form] of the transaction" (App. 86a). The prosecution advised the trial court "there is no set definition of what is a promissory note" and "[t]he Supreme Court of the United States has discussed it and evidence of indebtedness is even less subject to a clear definition" (App. 51a). The prosecution proposed the trial court instruct the jury that if "investment was a consideration or factor" in making the loan, then the loan was a "security" (App. 86a, 51a). The trial court, however, refused the instruction saying, "Well, the security is described in the [literal] instruction [App. 93a] that the Court has already granted from the Virginia Code," and "[t]he Code sections that have been the subject of the amended indictment don't talk about *investment* at all. . ." (App. 51a) (emphasis supplied).

Petitioner then argued on behalf of her instruction (App. 79a) that "not every note, nor is every evidence of indebtedness a 'security'," offering examples of the absurdity of such a literal definition (App. 54a), noting Petitioner's proposed instruction was "drawn from the statute when it speaks about [the transaction's] context" (App. 52a-53a), objecting that "just reading a Code section is not enough" (App. 52a), and concluding that both parties had invoked

the same case authority in proposing instructions that required the lender to have an investment motive for the "loan" to be a "security" (App. 53a). The trial court responded to the defense, as it had before to the prosecution, that "the instruction, as it's offered, contradicts the [literal] definition set out in the statute. The definition has already been given from [Section] 13.1 [of the Virginia Code], as one of the instructions considered this morning (App. 93a). I refuse this" (App. 54a).

When Petitioner submitted a legal memorandum (App. 82a-84a), and another proposed instruction (App. 85a, 57a-58a), reviewing the *Howey* test, the Court responded it had reviewed the memorandum and instruction, but refused to give it (App. 58a).

As a result, during summation, when Petitioner's counsel tried to argue that these political loans were not securities, the trial court instructed the jury that, if the instrument was a loan, it was irrelevant "whether it's a loan of a bank or a loan from a particular political party" (App. 62a). The trial court instructed the jury that every loan ("note") was a security (App. 93a).

Petitioner offered a jury instruction, pursuant to Va. Code §13.1-520(A), which required the jury to find Petitioner knew the notes were securities (App. 79a, 43a); the Court refused this instruction (App. 56a-57a). Instead the trial court instructed the jury that "it is *not necessary* that the [prosecution] prove that the defendant *knew* that what she was offering for sale or selling was a security." (App. 98a). The prosecution had conceded its instruction was "not the subject of a great deal of law in Virginia," referring the trial court to Professor Loss's treatise on the Uniform Act; the trial court disregarded the fact that the statutory provision the prosecution referenced did not require knowledge as an essential element (App. 44a, 285a). The prosecution's instruction was given over Petitioner's objection (App. 43a-47a, 58a-59a).

Finally, the trial court instructed the jury that, if defendant participated in any way in the making of any loan (security), and the crime of securities fraud or conspiracy resulted, then the jury could find Petitioner defrauded the lender and conspired to do so "whether such crime [either fraud or conspiracy] was originally contemplated or not" (App. 104a). The trial court said it was troubled how Mrs. Ascher could be held responsible for acts she is charged with "knowingly and wilfully" committing, *see e.g.*, App. 88a, 91a, and perhaps planning beforehand, *see* App. 99a, when the jury is also instructed she need not have "contemplated" the crime at all before its commission.

The Virginia Court of Appeals, *Ascher v. Commonwealth*, 12 Va.App. 1105, 408 S.E.2d 906 (1991) concluded that *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945 (1990), decided *after* Petitioner's trial, established a presumption that all notes were securities, grudgingly conceding that "in other circumstances" such a presumptive instruction "may have been insufficient" but "there is *no context* in which the jury could have found the notes at issue not to have been securities . . ." as "there were *no* facts to support the giving of Ascher's proffered instruction [App. 79a, 81a, and 85a] or a comparable instruction [App. 86a] defining when a promissory note or evidence of indebtedness is not a security" (App. 18a-19a). (Emphasis supplied.)

VII. THE QUESTIONS PRESENTED

1. THE VIRGINIA COURTS IMPERMISSIBLY CREATED A MANDATORY PRESUMPTION THAT EVERY LOAN IS A "SECURITY"

Petitioner was convicted by a jury that was not permitted to consider at least two elements of the securities fraud crimes she was charged with, namely, (1) whether the political loans she made were "securities" (the jury was instructed that all loans were securities), and (2)

whether Petitioner "knew" they were securities (the jury was instructed that it was not necessary that she know).

The prosecution's burden was thereby impermissibly lightened by the trial court below, even as Petitioner adduced evidence to prove that these loans were not securities, and that she did not know they were securities.

The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of a charged offense. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). Jury instructions that relieve state prosecutors of this burden of proof violate a defendant's due process rights. *See Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.ED.2d 39 (1979).

It is a basic tenet of securities law, more recently reaffirmed by this Court in *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945, 950 (1990), that the name ascribed to a financial instrument and the fact that such an instrument is listed in the Code's "definition of a security" is not dispositive of whether the instrument is, in fact, a security:

> ". . . the phrase 'any note' should not be interpreted to mean literally 'any note' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Act."

The substance of the transaction is therefore what is scrutinized, not the form. *United Housing Foundation v. Forman*, 421 U.S. 837, 848, 95 S.Ct. 2051, 2058, 44 L.Ed.2d 621 (1975), *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967).

At the time of Petitioner's trial, the test most often applied in Virginia to determine whether a "note" was a

security was the *Howey* test, inquiring whether the instrument involved:

> ". . . a transaction or scheme whereby [1] a person *invests* his money [2] in a common enterprise and [3] is *led to expect profits* [4] solely from the efforts of the promoter or a third party". (Emphasis supplied.) *S.E.C. v W.J. Howey Company*, 328 U.S. 293, 298-299, 66 S.Ct. 1100, 1103, 90 L.Ed.1244 (1946).

If the instrument failed to meet any one of the four elements of the *Howey* test, it was not a security. *See e.g., In Re Epic Mortgage Insurance Litigation*, 701 F. Supp. 1192, 1248 (E.D. Va. 1988).

At the time of Petitioner's trial, the *Howey* test had been followed in the Fourth Circuit encompassing the Commonwealth of Virginia,[9] and the Supreme Court of Virginia had interpreted its state securities statute in accordance with federal case law, *see e.g., Pollock v. Commonwealth*, 217 Va. 411, 229 S.E.2d 858, 860 (1976).

Petitioner therefore proposed two jury instructions (App. 81a, 85a), the last instruction expressly urging the trial court to use the *Howey* test.[10]

There was no question that there were facts that disputed whether these notes were securities. Both defense and prosecution witnesses testified they loaned funds but

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[9] *Lawler v. Gilliam*, 569 F.2d 1283 (4th Cir. 1978); *Epic Mortgage Insurance Litigation*, 701 F. Supp. 1192 (E.D. Va. 1988) (purchase and sale of whole loans and loan participation did not involve securities); *Principe v.McDonald's Corp.*, 463 F. Supp. 1149 (E.D. Va. 1979) (notes that were not negotiable, conferring no voting rights, and which did not appreciate in value were not securities); *Oliver v. Bostetter*, 426 F. Supp. 1082, at 1085 (D. Md. 1977).

[10] The prosecution proposed a jury instruction that required the jury to consider the lender's motives in making these loans (notes) (App. 86a).

these notes failed the first prong of the *Howey* test as the lenders swore they did not consider their loans investments (App. 231a, 232a, 234a-235a, 236a-237a, 238a-239a, 240a-241a, 247a, 249a). One lender explained his loan was not a financial investment but rather "an investment in the future of America" (App. 238a-239a, Va. App. 1949).

At the time of Petitioner's trial, *In Re Epic Mortgage Insurance Litigation*, 701 F. Supp. 1192, 1248 (E.D. Va. 1988), concluded that, when determining whether the instrument was an "investment," the courts considered:

> "[T]he size of the offering; whether it is, by necessity, reliance on the expertise of the issuer; the purpose of the issuer in executing the note and the payee in accepting the notes; and the economic inducements held out to the prospect[;] . . . the degree to which the profit on the notes is in the hands of the maker rather than the payee; whether the object of the holder was to acquire an interest in the property or enterprise; whether the note was primarily commercial because it was serving as a 'cash substitute' for the purchase price; and whether the return on the note was predetermined or could reasonably be anticipated, or was subject to the managerial efforts of the maker. *South Carolina National Bank v. Darmstadter*, 622 F. Supp. 226, 229-230 (D.S.C. 1985) quoting *Futura Development Corp. v. Centex Corp.*, 761 F.2d 33, 41 (1st Cir. 1985), *aff'd*, 813 F.2d 403 (4th Cir. 1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 951, 93 L.Ed. 2d 1000 (1987)."

By *Epic*'s definition, these notes were not "investments." Petitioner's "expertise" and "pitch" as a fundraiser was political, and not financial. The lender's "purpose" was also political. As for the "economic inducements," the lenders were informed that these political

organizations operated on a week-to-week budget (App. 246a) and, accordingly, these lenders made their political loans at no rate at all (App. 151a, 234a-235a, 243a, 244a, 247a, 249a; Commonwealth Exs. W18A-18F), at the same rate the funds cost the lender (App. 157a, 165a, 188a-190a, 206a, 212a, 214a-215a, 223a), for a nominal rate (App. 231a, 232a, Va. App. 1705), and even at a loss (App. 129a-130a, 132a, 157a, 212a, 214a-215a, 219a-220a). Rather than assert "an interest" in any LaRouche properties, many lenders forgave their loans instead (App. 238a-239a, 243a, 240a-241a, 244a), saying they considered the loans more like gifts or political donations (App. 231a, 243a).

When the notes had an interest rate, it was predetermined, specific, invariable, and independent of the "success" or "failure" of the LaRouche organizations to receive donations or sell subscriptions. These fixed interest loans failed the second prong of *Howey* since the lender had no expectation of profits as defined in *In Re Epic Mortgage Insurance Litigation*, *supra*, 701 F. Supp., at 1249:

> "Obligations of this sort [notes with a fixed interest rate] do not involve 'profit' for purposes of determining whether the obligations involved are securities. Payments of interest are 'not directly tied to profitability,' *McVay v. Western Plains Service Corp.*, 823 F.2d 1395, 1399 (10th Cir. 1987), since they are not dependent on, and do not vary with, the success of the venture. *See e.g., American Fletcher Mortgage Co. v. U.S. Steel Credit Corp.*, 635 F.2d 1247, 1254 (7th Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1982, 68 L.Ed. 2d 300 (1981); *National Bank of Commerce of Dallas v. All American Assurance Co.*, 583 F.2d 1295, 1301 (5th Cir. 1978)."[11]

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[11] Nor may the prosecution suggest the lender's profit was derived somehow by the tax deductions lenders received for their forgiven loans

As plainly set forth in "the statement of the case" above, the trial court admitted the evidence that proved these loans were not "securities" but denied Petitioner a contextual instruction by which the defense could argue the evidence to the jury or the jury could consider the evidence. The trial court remained steadfast in its mistaken resolve that it was sufficient to instruct the jury in the language of the statute, the literal definition of security. (App. 93a).

This Court has disapproved the use of any mandatory conclusive presumption not merely because it " 'conflict[s] with the overriding presumption of innocence with which the law endows the accused,' " *Sandstrom v. Montana*, 442 U.S. 510, 523, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39 (1979)(quoting *Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 256, 96 L.Ed. 288 (1952)), but also because it "'invade[s] [the] fact-finding function' which in a criminal case the law assigns solely to the jury," 442 U.S., at 523, 99 S.Ct., at 2459 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 446, 98 S.Ct. 2864, 2878, 57 L.Ed.2d 854 (1978)). The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S.Ct. 1444, 1450, 20 L.Ed.2d 491 (1968). This judgment reflects "a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.*, at 156, 88 S.Ct., at 1451. Thus, no judge may direct a verdict for the prosecution. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573, 97 S.Ct. 1349, 1355-1356, 51 L.Ed.2d 642 (1977). In *Carpenters v. United States*, 330 U.S. 395, 408-409, 67 S.Ct. 775, 782,

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as this Court has expressly rejected tax advantages as any evidence of income or profits. *United Housing Foundation v. Forman*, 421 U.S. 837, ——, 95 S.Ct. 2051, 2062, 44 L.Ed.2d 621 (1975).

91 L.Ed. 973 (1947), this Court found that "No matter how strong the evidence may be. . .", there had to be an appropriate jury instruction "[f]or a judge may not direct a verdict of guilty no matter how conclusive the evidence." Thus, the "question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 406, 90 L.Ed. 350 (1946).

On appeal to the Court of Appeals, Petitioner asserted she had been denied her due process rights by the trial court's refusal to render a contextual jury instruction. The Court of Appeals sought to save the trial court's manifest error by compounding it, (*first*), by explicitly establishing a novel mandatory presumption in a securities fraud prosecution that every note is a security in reliance on *Reves* decided *after* Petitioner's conviction (App. 20a), and, (*second*), by mis-stating the trial record to the effect that there were *no* facts adduced at trial to dispute the proposition that these loans were investments anyhow (App. 18a-19a).

This mandatory direction, sanctioned by the Virginia Court of Appeals, foreclosed the jury's consideration of whether the facts adduced at trial did prove every essential element of Petitioner's alleged crimes beyond a reasonable doubt. *Francis v. Franklin*, *supra*, 105 S.Ct., at 1971, explained that "a mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts," such as the existence of a note or evidence of indebtedness, the only predicate facts the trial court required the prosecution to prove. This Court long ago disapproved adjudging guilt by standards that apply in civil cases.[12]

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[12] In *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), this Court cited approvingly the state court's observations that "a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fair-

The Virginia Court of Appeals did not concern itself that there was no such presumption at the time of Petitioner's trial. In *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S.Ct. 2297, 2306, 85 L.Ed.2d 692 (1985), the harbinger of *Reves*, Justice Powell, albeit in *dicta*, declined to find that "any" note was a security, commenting instead that a "note" was "a *relatively broad term* that encompasse[d] instruments with *widely varying* characteristics, depending on whether issued in a consumer context, as commercial paper, or in some other investment context." (Emphasis supplied.). As the retroactive application of the *Reves* test and its substitution for the *Howey* test affected "the quantity or the degree of proof necessary to establish [petitioner's] guilt," *Hopt v. Utah*, 110 U.S. 574, 589-590, 4 S.Ct. 202, 209-210, 28 L.Ed. 262 (1884), then the Virginia Court of Appeals violated the *ex post facto* clause of the United States Constitution.

Finally, the Virginia Court of Appeals erred when it found that Petitioner had not adduced evidence meriting a contextual instruction under the recent *Reves* decision. *Reves* rejected the *Howey* test as the standard, and adopted a "more promising framework for analysis," namely, that a "note" will *not* be considered a security if: (a) it bears a strong "family resemblance" to any one of certain established categories of non-securities,[13] or (b) it otherwise bears sufficient indicia of a non-security to warrant creation of a new category. *Reves*, 110 S.Ct., at 950-951.

To determine whether the notes made by the LaRouche supporters were securities, one must examine four factors:

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ness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case" (citations omitted).

[13] These categories were originally set forth by the Second Circuit in *Exchange Nat'l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1137 (2d Cir. 1976), and in *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 939 (2d Cir. 1984).

(1) the motivations that would prompt a reasonable seller and buyer to enter into the transaction; (2) the plan of distribution of the instrument; (3) the reasonable expectations of the public; and (4) the existence of some other factor, such as another regulatory scheme, that renders securities regulations unnecessary. *Reves*, 110 S.Ct., at 951-952.

Under the *Reves* factors, these notes were not securities:[14]

1. *The motivations of the parties to the transaction.* In formulating its first test, this Court drew the traditional distinction between commercial and investment motivations, stating an instrument is more like a security "[i]f the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments *and* the buyer is interested *primarily* in the profit the note is expected to generate. . ." (Emphasis Supplied). *Id.*, 110 S.Ct., at 951-952.[15] The trial witnesses repeatedly indicated they were not "primarily" interested in profits. They were "primarily" interested in politics, in advancing various causes. The Virginia Court of Appeals' decision overlooked any of the lenders' trial testimony evidencing the fact that they were *not* "primarily" motivated to make a profit, indeed many were guaranteed by the express terms of the notes they signed that they would receive *no* interest, or *no* net return, or could expect a *loss* (since

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[14] Cases since *Reves* have concluded that an instrument will be deemed not a security where even two of the four *Reves* factors so indicate. *Premier Microwave Corp. v. Comtech Telecommunications Corp.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,789 (S.D.N.Y. Jan. 28, 1991)(Wood, J.); *Iacobucci v. Universal Bank*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,075 (S.D.N.Y. Jan. 28, 1991) (Keenan, J.).

[15] *Reves* therefore directly contradicted the prosecution's proposed contextual instruction in the trial court below that investment need not be a "primary" factor (App. 86a).

the lender borrowed the funds to make the loan at a higher rate—usually on his credit card—than the rate he requested the LaRouche organizations pay in return). Moreover, the Virginia Court of Appeals found that "interest" terms on the notes were synonymous with "profit" rather than simply a factor to be considered in determining motive (App. 22a, n. 6 and accompanying text), overlooking again that the interest at issue in *Reves* "was an interest rate constantly revised to keep it slightly above the rate paid by local banks and savings and loans," *Reves*, 110 S.Ct., at 953, and the rate at issue in Petitioner's case was fixed and, as noted in the discussion of the *Howey* test above, not related to the success of the LaRouche organizations donation or subscription drives.[16]

This Court also specifically found in *Reves* that if a note or loan is made "to correct for the seller's cash-flow difficulties . . . the note is less sensibly described as a 'security'", *Reves v. Ernst & Young*, *supra*, 110 S.Ct., at 952, and trial witnesses testified they loaned their monies to cover funds taken from the LaRouche organizations until the organizations could recoup their losses (App. 231a, 232a, 236a-237a).

2. *The plan of distribution.* A note is likely to be a security if "it is an instrument in which there is 'common trading for *speculation* or *investment*' ", *Reves v. Ernst & Young*, *supra*, 110 S.Ct., at 952. In *Reves*, notes were offered in a "large scale offering" to 23,000 "unsophis-

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[16] The Court of Appeals' rhetorical grasp exceeded the reach of the evidence when it mis-stated the record, saying that Dr. Allen's pension funds required him to make a "profit" (App. 23a), rather than merely to receive "interest" on any withdrawal from his pension fund, doing so without particular regard for Dr. Allen's individual motivation. Dr. E. G. Allen testified he loaned funds (Count 11) "because [he] supported the political position of the organization" (App. 194a), and conceded the funds he withdrew from his pension funds to make some of the loans had to "earn" interest lest he jeopardize his tax status, characterizing the interest earned as "nominal" (Va. App. 1705).

ticated members of the public" and sold to over 1,600 such persons. 110 S.Ct., at 953-954. This Court therefore concluded in *Reves* that the notes were "offered and sold to a broad segment of the public, and that is all that we have held to be necessary to establish the requisite trading." 110 S.Ct., at 953. This Court underscored it did not have to find the instruments were traded on any exchange. By contrast, in this case, the loans were not advertised to the general public, and were not "traded" in the sense apparently intended by *Reves*. These notes were neither transferable nor negotiable. Although there were some 2,000 notes issued from 1984 through 1986, the notes were negotiated individually with persons who had already expressed support for LaRouche and for the causes he espoused as evidenced variously by the lender's conversations at road-side card tables, by way of political action, after subscribing to various LaRouche publications, and making one or more contributions. The notes such a lender made thereafter was but another form of political commitment. The loans did not evidence financial speculation or investment. Nor was it crucial in the circumstances of this case that some individual lenders were unsophisticated, or that other lenders were very sophisticated. As discussed previously, these notes were simple transactions; they did not involve a variable interest rate or terms, and were neither transferable nor negotiable once made.

3. *The reasonable expectation of the investing public.* The third *Reves* factor requires an examination of the reasonable expectations of the investing *public*, *Reves v. Ernst & Young*, *supra*., 110 S.Ct., at 952. The "general public" was not, however, included in these loan solicitations. If this is in fact the purport of the language, "public," in *Reves*, then perhaps we may conclude on this point here. But, if it may be argued that the language, "investing public," should be read more narrowly to include those LaRouche supporters who deigned to loan funds, it is not reasonable to expect that any lender appreciated that these

notes were, or could be considered, securities. Each instrument on its face purported to be a note, or evidence of indebtedness, and *not* a security. Neither Petitioner nor any witness testified they believed these notes to be securities. Further, if it is the "reasonable" expectations of the individual LaRouche supporters *qua* "the investing public" that we must consider, it appears unreasonable that, given the lender's initial card-table contacts, the lender's discussions about political issues, political action, subscriptions to propaganda-laden publications, and donations to these same political causes, that any lender expected or appreciated that the purpose of the loan that followed upon such goings on was a business opportunity, rather than another political undertaking in a consistent course of political action, albeit of a different financial hue than a political contribution. In this context, the term "investment" was understood to mean a "political investment" when bandied about.[17] In this regard, it is pertinent that this Court stated that, when applying this third prong, the fact-finder should consider "countervailing factors that would have led a reasonable person to question" the characterization the loans were investments. *Reves v. Ernst & Young, supra*, 110 S.Ct., at 953.

4. *The existence of another regulatory scheme or other risk-reducing factor making application of the securities law unnecessary.* Applying the fourth *Reves* test, whether there is another regulatory scheme that significantly reduces the risk of the instrument, rendering application of the state securities code unnecessary, *Reves v. Ernst & Young, supra*, 110 S.Ct., at 952, Petitioner submits this test is obviously satisfied in the Commonwealth of Virginia

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[17] By analogy, the Tenth Circuit has rejected any relationship between the lay term "investment" found in sales literature promoting loan participations and a "security," and held: "[t]he participation agreement was no more an investment [in the legal sense] than a loan . . . directly to the borrower would have been." *McVay v. Western Plains Serv. Corp.*, 823 F.2d 1395, 1399 n. 5 (10th Cir. 1987).

by the existence of its general fraud or false pretense statute.[18]

2. THE VIRGINIA COURTS MAY NOT WITHDRAW AS AN ELEMENT OF THE CRIME OF SECURITIES FRAUD THE "KNOWLEDGE" THAT THE NOTES SOLD WERE "SECURITIES" IN CONTRADICTION OF THE EXPRESS LANGUAGE FOUND IN THE SECURITIES STATUTE REQUIRING THAT THE CONDUCT BE DONE "KNOWINGLY," AND IN THE PROSECUTION'S BILL OF PARTICULARS

The felony provision, Va. Code Ann. § 13.1-520A, provided that the acts declared unlawful must be done "knowingly," and this knowledge that the transactions involved securities was essential to every act charged.[19] The prosecution's Bill of Particulars specifically charged that Petitioner had "knowledge" that she was dealing in "securities" (App. 74a). There was, however, an evidential shortfall at Petitioner's trial and, when Petitioner offered a jury instruction, consistent with Va. Code §13.1-520(A), requiring the jury to find beyond a reasonable doubt that Petitioner "knew" the notes were securities (App. 79a), the prosecution opposed the instruction and the trial court refused it. Over Petitioner's objection, the trial court instructed the jury instead that "it is *not necessary* that the Commonwealth prove that the defendant *knew* that what

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[18] Va. Code § 18.2-178; *Marine Bank v. Weaver*, *supra*, 455 U.S. 551, at 556 (1972)("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.")

[19] The acts declared unlawful are: (1) offering or selling an unregistered and non-exempt *security* (§13.1-507); (2) transacting business as an unregistered agent in selling nonexempt *securities* (§13.1-501(b), 504); and (3) *in connection with the sale of any securities*, directly or indirectly employing a scheme to defraud; making false material statements or material omissions; or engaging in transactions, practice or course of business operating as a fraud or deceit upon the purchaser. (§13.1-502). The conspiracy count involves an *agreement* to fraudulently sell *securities*.

she was offering for sale or selling was a security" (App. 98a).

The word "knowingly" in a statute imparts a requirement that an act or omission be undertaken with a "knowledge of the *facts* from which the law presumes a knowledge of the legal consequences arising therefrom." *Gottlieb v. Commonwealth*, 126 Va. 807, 810-11, 101 S.E.2d 872, 873 (1920); *United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938). The failure of the trial court to instruct the jury appropriately on the essential element of knowledge rendered meaningless the willfulness instruction provided (App. 97a) that said an act done "willfully" must be done "knowingly," and conflicted with the very next instruction that said "knowledge" was not necessary (App. 98a).[20] In *United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938), this Court noted that "'willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively."

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[20] In *Lambert v. Commonwealth*, 6 Va. App. 745, 367 S.E.2d 745 (1988), the Virginia Court of Appeals, quoting *Lynch v. Commonwealth*, 131 Va. 762, 766, 109 S.E. 427, 428 (1921) stated:

> "The word [willful] often denotes an act which is *intentional, knowing or voluntary as distinguished from accidental. But when used in a criminal statute* it generally means an act done with a bad purpose, without justifiable excuse, stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful. *Id.* at 746, emphasis supplied.
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> "When a criminal offense is defined by a willful failure to perform a certain act, it is not sufficient to support a conviction merely to establish that the accused did not do a certain act without establishing circumstances warranting an inference that the failure to act was intentional or by design." (emphasis supplied.) *Id.* at 747.

By the trial court's dual instructions: (1) that every note was a security, and (2) that it was "*not necessary* that the [prosecution] prove that the defendant *knew* that. . ." (App. 98a), the trial court permitted the jury to convict Petitioner of an offense for which the statute gave no notice, and concerning which she was entirely unaware.

Citing this Court's decision in *Screws v. United States*, 325 U.S. 91, 101-102, 65 S.Ct. 1031, 1035-1035 (1945), the Arizona Court of Appeals, in *State v. Tober*, 826 P. 2d 1199, 96 Ariz. Adv. Rep. 91 (Ariz. App. 1991), found a state securities statute that made (1) every note a security, and (2) did not require knowledge that the instrument was a security, to be unconstitutionally vague and violative of due process:

> "[O]ne who is found by a jury to have violated those [securities] laws is held strictly liable without the state having to prove any level of intent. Consequently, a lack of intent to violate the law or good faith belief that the note in question was not a security is not a defense in Arizona, in marked contrast to federal law [citing Title 15 U.S.C. § 78ff (Supp. 1991)(proscribing penalties for "willful violation") and *United States v. Rubinson*, 543 F.2d 951, 959 (2d Cir. 1976), *cert. denied*, 429 U.S. 850 (1976)(in prosecution for conspiracy to sell unregistered securities, government required to prove that defendants knew of or deliberated closed their eyes to, the necessity for registering stock for sale).]"

The Arizona Court therefore reasoned as follows:

> "[W]e are convinced that the Supreme Court's observations in *Screws* are equally valid in this case. Whether a note that is made a security under the statute is in fact a security depends on the circumstances surrounding its issuance. To subject every issuer of a note to potential incar-

ceration in the state prison for up to five years based upon an after-the-fact determination is to place the commercial world at 'risk on a vast uncharted sea.' *Screws*, 325 U.S., at 98, 65 S.Ct., at 1033. That risk is substantially lessened if the note is issued with an intent to circumvent or with blind disregard for the law. One who acts intentionally or knowingly can hardly be heard to say he did not have fair warning that his acts were prohibited by statute."

3. THE VIRGINIA COURTS MAY NOT WITHDRAW AN ELEMENT OF THE CRIMES CHARGED, AND OTHERWISE CONFOUND A JURY BY INSTRUCTING THEM THAT IF THE ACCUSED PARTICIPATED IN ANY WAY IN THE "SALE" OF A "SECURITY," SHE WAS LIABLE FOR CONSPIRACY AND FOR INTENT TO COMMIT SECURITIES FRAUD WHETHER OR NOT SHE CONTEMPLATED SUCH CRIMES BEFOREHAND

The "concert of action" instruction contradicts elements of the crime of conspiracy without providing the jury any means to reconcile differences between the two instructions. The trial court's instruction, "concert of action," reproduced in the margin,[21] blithely ignored the principal element of the crime of conspiracy, "the agreement", making the contradictory and incorrect assertion that a defendant may be answerable for conspiracy "whether such crime was originally contemplated or not." This same accomplice instruction, inappropriate to the crime of conspiracy and no more applicable to the fraud counts, abrogated the intent element necessary to each of the

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[21] Instruction No. 35 stated: "If there is concert of action with the resulting crime one of its incidental probable consequences, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime." App. 104a.

remaining fraud counts. The concert of action instruction, applied to the fraud counts, allowed the jury to conclude that there was a fraudulent intent *at the time* of the transaction based upon subsequent defaults on the notes.

It has long been established in Virginia that "[t]here can be no conspiracy without an agreement. . .and the Commonwealth must prove beyond a reasonable doubt [as an element of the crime of conspiracy] that an agreement existed." *Floyd v. Commonwealth*, 219 Va. 575, 249 S.E.2d 171, 174 (1978). Nor can a jury be permitted to fudge the difference between conspiracy and the offense of aiding and abetting.[22]

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[22] *Zuniga v. Commonwealth*, 7 Va. App. 523, 527, 375 S.E.2d 381, 384 (Va. App. 1988), cited approvingly an opinion by Circuit Judge Kravitch, *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980), comparing the offense of conspiracy with the offense of aiding and abetting as follows:

> The essence of conspiracy is proof of a conspiratorial agreement while aiding and abetting requires there be a "community of unlawful intent" between the aider and abettor and the principal. While a community of unlawful intent is similar to an agreement, it is not the same. Thus, a defendant may wittingly aid a criminal act and be liable as an aider and abettor, *United States v. Alvarez*, 610 F.2d 1250 (5th Cir. 1980), *rehearing en banc granted* . . . but *not be* liable for conspiracy, which requires *knowledge of and voluntary participation in an agreement* to do an illegal act, *United States v. Suarez*, 608 F.2d 584, 586 (5th Cir. 1979). "As a matter of law, aiding and abetting the commission of a crime and conspiracy to commit that crime are separate and distinct offenses. . . Thus, as a general rule, the double jeopardy clause does not prevent prosecution for both conspiracy and aiding and abetting." *United States v. Nelson*, 599 F.2d 714, 716 (5th Cir. 1979). (Emphasis supplied.)

The Supreme Court of Virginia enunciated this proposition clearly in *Heacock v. Commonwealth*, 228 Va. 397, 407, 323 S.E.2d 90, 95-96 (1984); in *Zuniga, supra*, 375 S.Ed.2d, at 385, this Court explained

The jury in Petitioner's case was instructed, however, there was *no* distinction between conspiracy and aiding and abetting, that it was sufficient if the accused "participated in any way" in some "concert of action" to solicit loans from LaRouche's supporters provided only that some crime (to defraud lenders) was an "*incidental* probable consequence" of such action, albeit accomplished by any "other person [not necessarily a co-conspirator] connected with the consummation of such resulting crime", that is, no matter that the other person was not a party to any agreement beforehand to commit the crime; and, that it did not matter that Petitioner had not agreed beforehand to commit any crime; in fact the instruction goes further than that, it says the crime need not have even been "contemplated" beforehand.

This Court has held that *no* conviction may stand if the jury's verdict could have rested on unconstitutional grounds. *See, e.g., Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); *Williams v. North Carolina*, 317 U.S 287, 291092, 63 S.Ct. 207, 209-210, 87 L.Ed. 279 (1942); *Cramer v. United States*, 325 U.S. 1, 36, n. 45, 65 S.Ct. 918, 935, n. 45, 89 L.Ed. 1441 (1945); *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed. 2d 1356 (1957); *Leary v. United States*, 395 U.S. 6, 31-32, 89 S.Ct. 1532, 1545-1546, 23 L.Ed.2d 57 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 571, 90 S.Ct. 1312, 1316, 25 L.Ed.2d 570 (1970); *see also Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed. 2d 705 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

Heacock's holding as follows:

> Evidence which merely establishes aiding or abet ing in the commission of the distribution offense [the crime at issue there] will not suffice to prove a conspiracy.

Where one jury instruction is unclear, as here, another one can not be chosen because it appears to be correct because "[t]o do so would transfer to the jury the judge's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 406, 90 L.Ed. 350 (1946). Nor may it be said, in the context of the overall charge, *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 1206, 108 L.Ed.2d 316 (1990), that anything in the charge could overcome the constitutional inadequacy of the contradictory instructions rendered by the trial court here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

JOHN P. FLANNERY, II, ESQ.
Counsel for Petitioner

July 16, 1992

(2)

Supreme Court, U.S.
FILED
JUL 16 1992
OFFICE OF THE CLERK

92-106

No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROCHELLE JOYCE ASCHER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

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APPENDIX

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TABLE OF CONTENTS

APPENDIX

Page

I. Decision Sought to be Reviewed:

Ascher v. Commonwealth, 12 Va. App. 1105, 408 S.E.2d 906 (Record No. 1011-89-4)(Court of Appeals of Virginia) (Panel decision by Judge Sam W. Coleman III), dated August 31, 1991 (affirming conviction, and upholding jury instructions) 1a

II. Necessary Opinions, and Orders:

Virginia Supreme Court Decision & Order (denying petition for discretionary appeal), dated March 11, 1992 ..... 29a

Virginia Court of Appeals Opinion & Order (granting in part six issues including the questioned jury instructions and otherwise denying defendant's petition for discretionary appeal), dated July 25, 1990 ..... 30a

Order of Conviction & Sentence for conspiracy and securities fraud, entered by Circuit Judge Carleton Penn, Loudoun County Circuit Court (trial court), dated June 19, 1989 ..... 35a

III. Trial Transcript Excerpts of Colloquys Relating to Disputed Jury Instructions (definition of securities, etc.): 40a

Trial Date	Transcript page(s)	
3/24/89	pp. 22-27 (concert of action, conspiracy)	40a
	pp. 28-32, 42-44 (knowledge)	43a
	pp. 42-44, 46-52, 174-77 (definition of security)	46a
3/27/89	pp. 5-6 (instructions to be given)	55a

pp. 12-13 (knowledge) 56a
pp. 23-24 (definition of security) 57a
pp. 24-26 (knowledge) 58a
3/28/89 pp. 90-93 (summation: dispute about definition of security) 61a

IV. Rehearing Orders:

Virginia Supreme Court Decision & Order (denying Petition for Rehearing), dated April 17, 1992 ..... 64a

Virginia Court of Appeals Decision & Order (denying Petition for Rehearing), dated October 17, 1991 ..... 65a

V. PLEADINGS: Indictment, Bill of Particulars, Jury Instructions:

A. INDICTMENT:

1. Conspiracy Count, as amended 66a
2. Substantive Securities Counts One through Eleven (1-11), as amended ... 67a

B. BILL OF PARTICULARS

Commonwealth's "Answer to Defendant's Motion for a Bill of Particulars" 73a

C. JURY INSTRUCTIONS

1. Defendant's Proposed Jury Instructions *re* Virginia Security Code 79a
2. Defendant's "Memorandum of Law: The Definition of a Security" (and attached proposed jury instruction), dated March 26, 1989 ..... 82a
3. Commonwealth's Proposed Jury Instruction *re* Virginia Security Code 86a
4. Jury Instructions: Nos. 8, 9, 10, 11, 17, 25, 26, 27, 28, 29, 31, 32, 33, 34, and 35 (approved by trial court and given to the jury) 87a

VI. Trial Testimony Transcript excerpts relating to securities 105a

Trial Date	Witness (Direct/Cross, and page reference)	
2/2/89	L.W. Burchett Direct, pp. 81, 94-95	105a
2/3/89	L.W. Burchett Ascher tape, pp. 31-36, 58, 62, 84, 181-85 Cross, pp. 108-09	108a
2/22/89	J. Herndon Cross, pp. 72-74, 80-81	131a
2/23/89	C. Waddell Direct, pp. 80-83, 102-104 Cross, pp. 105, 112-16, 118-19, 123-25, 128-30, 132-33	135a
2/24/89	C.E. Newell Direct, pp. 159-61	153a
2/27/89	C.E. Newell Direct, pp. 8-10	156a
	G. Thompson Direct, pp. 44, 51-55 Cross, pp. 82, 85, 88-89, 105	159a
2/28/89	M.T. Dooley (Government's securities expert witness) Direct, pp. 18-30 Colloquy, pp. 48-49	168a
3/6/89	E.G. Allen Direct, pp. 90-107 Cross, pp. 126, 131, 141-45 Redirect, pp. 160-61	180a
3/8/89	E.L. Parker Direct, pp. 4-9	202a
3/9/89	R.A. Hiatt Direct, pp. 74-80 Cross, pp. 95-96, 98, 102-103	207a
3/10/89	A. Cotterino Direct, pp. 150-56, 158-59 Cross, pp. 187-94	217a

3/13/89	A. Dunn Direct, pp. 86, 89	231a
	C. Jones Direct, p. 115	233a
3/14/89	H. Griffith Direct, pp. 27-29	234a
	J. Hereford Direct, pp. 58-60	236a
3/15/89	M. Fairchild, Direct, pp. 55-56	238a
	G. Eddleston Direct, pp. 79-80 Cross, p. 87	240a
	C. McCarthy Direct, pp. 103, 110-11	243a
3/16/89	R. Watson Direct, pp. 61-63 Cross, p. 77	246a
	H.N. Butler (Defendant's securities expert witness) Direct, pp. 141-49, 155	250a
	R. Hull Direct, p. 198	257a
3/17/89	S. Gregory Direct, p. 51	258a
3/20/89	R. Ascher Direct, pp. 18, 78, 82, 85, 97, 99-101, 105-106, 111, 119, 121-22, 124, 143-47	259a

VII. Companion Order:

Order (of Circuit Judge Carleton Penn)(changing venue for remaining co-defendants in companion cases), dated April 12, 1989 ..... 275a

VIII. Constitutional, statutory, and model code provisions:

Virginia Code Sections 13.1-501, 13.1-502, 13.1-504, 13.1-507, 13.1-520, and 18.2-22 .... 278a

Title 15, United States Code, Sections 77b, and 77x 284a

7B, Uniform Laws Ann., Sections 401, 409 ..... 285a

Amendments to the United States Constitution: The First, Fifth, Sixth, and Fourteenth Amendments 286a

COURT OF APPEALS OF VIRGINIA

Record No. 1011-89-4

Present: Judges Coleman, Keenan* and Moon
Argued at Alexandria

ROCHELLE JOYCE ASCHER

v.

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE SAM W. COLEMAN III
AUGUST 13, 1991

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY
Carleton Penn, Judge Designate

John P. Flannery, II for appellant.

John B. Russell, Jr., Senior Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

In February of 1987, Rochelle Joyce Ascher was indicted by a Loudoun County grand jury on eleven counts of se-

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* Justice Keenan participated in the hearing and decision of this case prior to her investiture as a Justice of the Supreme Court of Virginia.

curities fraud[1] in violation of the Virginia Securities Act, Code § 13.1 501 *et seq.*, occurring from 1984 through 1986. The grand jury later indicted Ascher for conspiracy to commit securities fraud in violation of Code §§ 18.2-22 and 13.1-520(A).

The allegedly fraudulent sales arose out of Ascher's position as a fund-raiser for [408 S.E.2d, at 909] Lyndon H. LaRouche, Jr., and his political organization, the National Caucus of Labor Committees (NCLC). As a fund-raiser,

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[1] Count 1 charged Ascher with selling unregistered securities in the form of promissory notes in violation of Code § 13.1-507.

Count 2 charged Ascher with transacting business as an unregistered broker-dealer, investment advisor and agent in violation of Code § 13.1-504.

Counts 3 through 11 charged that Ascher did unlawfully offer and sell securities to various persons in violation of Code § 13.1-502, which reads:

"It shall be unlawful for any person in the offer or sale of any securities, directly or indirectly,

(1) To employ any device, scheme or artifice to defraud, or

(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Significantly, each of these counts charged that Ascher violated the various provisions of the Virginia Securities Act knowingly and willfully, thus invoking the criminal sanctions imposed by Code § 13.1-520(A):

"Any person who shall knowingly and willfully make, or cause to be made, any false statement in any book of account or other paper of any person subject to the provisions of this chapter, or knowingly and willfully exhibit any false paper to the Commission, or who shall knowingly and willfully commit any act declared unlawful by this chapter, with the intent to defraud any purchaser of securities or user of investment advisory services or with the intent to deceive the Commission as to any material fact for the purpose of inducing the Commission to take any action or refrain from taking any action pursuant to this chapter, shall be guilty of a Class 4 felony."

Ascher solicited contributions and loans from LaRouche political supporters to underwrite LaRouche's political publications and endeavors. She issued promissory notes obligating the LaRouche organizations as evidence of the indebtedness for the loans. After a ten-week jury trial, during which the trial court dismissed three of the charges for improper venue, the jury convicted Ascher on the eight counts of securities fraud and on the conspiracy count. The jury recommended penitentiary sentences totalling eighty-six years. The trial judge suspended certain sentences and ordered that others be served concurrently, resulting in Ascher receiving concurrent penitentiary sentences of ten years to be served and a ten-year suspended sentence.

Testimony from lenders, co-workers, and from Ascher explain her participation in the transactions which led to these securities prosecutions and convictions.

Rochelle Ascher, a college graduate who has almost completed the requirements for a masters degree in education, played a key role in fund-raising for the NCLC. She served as a supervisor of fund-raising, which included personally soliciting loans, training other fund-raisers, and issuing promissory notes. After joining the NCLC in 1973, Ascher began working for NCLC full time in January 1980, when she became head of the phone team in the Baltimore regional office. Ascher solicited loans for several subsidiary companies of the NCLC whose functions were writing, editing, publishing, and mailing political publications. The companies for which Ascher solicited loans were: Caucus Distributors, Inc.; Campaigner Publications, Inc.; Executive Intelligence Review; Fusion Energy Foundation; and Publication & General Management, Inc. Known within the LaRouche organization as "infrastructure loans," the funds were used to support publication costs of the companies and the entire organization's operating expenses, which averaged $600,000 per week. "Infrastructure debt" was

kept separate and distinct from the debt created by fund-raising for Lyndon LaRouche's political campaigns.[2]

The national headquarters for the NCLC and its operating companies, known as the National Center, moved to Leesburg, Virginia from New York in 1984. Ascher maintained frequent daily telephone contact from Baltimore with her phone team counterparts in the National Center, exchanging names of potential lenders and information on successful fund-raising tactics. The Finance Office of the National Center was responsible for banking the funds, accounting, paying vendors, and tracking and paying debts for the affiliated companies of the NCLC. Ascher communicated frequently with members of the Finance Office, particularly Donald Phau, its director, and William Hintz, whose primary responsibility was to track repayment of the loans and handle complaints.

As head of the phone team in Baltimore, Ascher trained new fund-raisers there and in the National Center. Trainees started as "boilers" who would make cold calls to individuals whose names had usually been obtained through door-to-door and airport fund-raising operations. Ascher helped train the boilers to make "cold hits," which was obtaining small contributions from first-time calls. Boilers were provided scripts, and members of the phone team, including Ascher, would critique their calls and improved techniques. Ascher instructed the boilers to convey a sense of urgency and to ask the potential lender to support a specific organization project. Cold hits were then referred to members of the phone team, such as Ascher, who would attempt to solicit what the fund-raisers [408 S.E.2d, at

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[2] Funds for LaRouche's political campaigns were raised by separate organizations known as Independent Democrats for LaRouche and LaRouche Campaign. The Commonwealth acknowledges that promissory notes issued as evidence for a loan to a political campaign may qualify for an exemption in the discretion of the commission under Code § 13.1-514.1(B).

910] knew as "specials," which are loans, contributions, or sales in excess of $5,000.

Fund-raisers, including Ascher, had a uniform method of soliciting loans. They discussed various political issues with the potential lenders before seeking a contribution. If it appeared that the contact would not make a contribution, the fund-raiser would then solicit a loan, usually promising a higher interest rate than banks. Ascher and other fund-raisers told the contacts that the banks were a "bunch of crooks" and "drug money launderers." When a lender would inquire about the loan repayment history of the organization, the standard procedure was to inform the potential lender that his or her money would be completely safe. When a contact committed to make a "special," to avoid any delays or change of mind, a courier was dispatched to receive the money. The lender was issued a promissory note at the promised rate of interest.

As head of the Baltimore region, Ascher also supervised progress toward meeting regional and national quotas, which had been set by the National Executive Committee (NEC) located in Leesburg. The National Center held daily morning and evening briefings to announce the progress toward the quotas, which information was disseminated to the regions throughout the day. Ascher also kept records of each fund-raiser's progress toward individual quotas set by the NEC.

Ascher was also responsible for issuing many of the promissory notes for the loans solicited from the Baltimore office. She retained a copy of each note and sent a copy to the National Center. When the Baltimore Office was not to issue the promissory note for aparticular loan, Ascher would execute a loan voucher form which was sent to the Finance Office at the National Center to issue the note. The National Center would issue a blank promissory note signed by an officer of the organization, usually William Hintz, on terms contained in the loan voucher form

prepared and submitted by Ascher or from her counterpart in the other regions.

In early 1985, after the National Center had moved to Leesburg, promissory notes were generally issued from the National Center rather than from regional offices. By August 1985, the organization began using letters of indebtedness. The letter of indebtedness contained the terms of the loan, but was written in the form of a letter so as to appear less like a promissory note. Hintz testified that the National Center changed to a letter of indebtedness, and also shortened the term of repayment to eight or nine months, in order to make the loan not have characteristics of a security.

As early as 1984, Ascher became aware that loans were being repaid on a selective basis. She reviewed lists of loans owed to lenders; she knew the weekly budget allotted for repayment of loans was less than the amount owed and that funds did not exist to repay all the lenders in the Baltimore region. Since only a few lenders would be repaid, the Finance Office established a system to prioritize lenders into categories. For example, the "legal" category were lenders who filed lawsuits, had threatened legal action, or had retained an attorney. The "hardship" category included lenders who demanded-repayment because they were in financial straits. A third category was politically active and influential people with whom the NCLC wanted to maintain a good reputation.

Ascher regularly contacted the Finance Office about ranking individuals for repayment, and she kept her own ranking of those lenders she considered important. As early as June 1984, Ascher personally received numerous and regular complaints about nonrepayment from lenders. Despite ongoing complaints and daily communication with the finance office at the National Center regarding the organization's inability to repay, Ascher continued to solicit loans as late as November 1986. Although Ascher claimed

to have been forthright about the organization's difficulties, others testified that she continued to promise lenders that: "we always . . . pay back [408 S.E.2d, at 911] every person," and that for "thirteen years" the organization never had any problem repaying loans. Transcripts of her telephone solicitations made to an undercover investigator during September 1986 confirm that she made these representations. Ascher continued to solicit loans after federal and state search warrants were executed on the organization's headquarters in Leesburg in October 1986.

In 1985, Lyndon LaRouche and his organizations came under scrutiny from various law enforcement agencies in Virginia and elsewhere. Extensive publicity regarding Mr. LaRouche and his organization's dealings appeared in newspapers and news broadcasts in the Leesburg, Loudoun County, and Washington, D. C. areas. In July 1987, two years before her trial, Ascher filed a motion to change venue on the ground that extensive adverse pretrial publicity would make it impossible to seat an impartial jury in Loudoun County. The trial court deferred ruling on the motion before it attempted to seat a jury. During the ensuing months until trial, publicity increased about the case and the LaRouche organization, since, in the interim, Lyndon LaRouche had been tried and convicted in Loudoun County, and was scheduled to be sentenced around the time that Ascher's trial was to begin. Jury selection began on January 23, 1989. It lasted eight days, during which one hundred and fifteen venire persons were examined on voir dire. When the trial court seated a panel which it considered free from exception, it overruled Ascher's motion to change venue over her continued objections.[3]

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[3] In subsequent prosecutions of other defendants indicted in Loudoun County for similar offenses arising from their involvement in raising funds or obtaining loans for the LaRouche related organizations, the trial court granted a change in venue, conceding that the court had "extreme difficulty in seating a jury in Ascher'scase.

Ascher's trial lasted ten weeks. The witnesses included those people who had dealt with Rochelle Ascher, had loaned the organization money and received a promissory note. Other witnesses included state investigators who had examined the records and operations of NCLC, and former NCLC co-workers of Ascher.

Ascher has been granted an appeal on six assignments of error, which we address in order:

I. JURY-SELECTION

Change of Venue

First, Ascher contends the strongest evidence that the trial court should have granted her motion to change venue is the fact that it did so for every other defendant indicted in Loudoun County in the LaRouche related prosecutions. We reject this argument. Following jury selection in Ascher's case, the trial court made known its inclination to change venue in the other related cases:

> [I]n light of the fact that the voir dire in this case took longer than was anticipated by the Court being of the opinion that the timing of the LaRouche sentencing and findings complicated voir dire here, so that it took longer than this court anticipated.
>
> Now, with that having occurred and now with this case being in the media, it may be even more difficult to obtain another venire in Loudoun County.

The trial court's decision to change venue in subsequent cases was based upon the circumstances existing at that time those cases came to trial. Also, the decision to change venue in those cases was discretionary, rather than mandatory, and was based upon practical considerations of time, expense, and inconvenience in seating an impartial jury in Loudoun County. Whether the trial court erred in

denying a change of venue depends upon the circumstances in this case, not the situation in other cases.

Ascher further contends the trial court erred by denying her motion to change venue based on pretrial publicity which tainted the prospective jurors. "A motion for a change of venire or venue is [408 S.E.2d, at 912] addressed to the sound discretion of the trial judge, and his action in overruling such a motion will not be reversed unless the record affirmatively shows that there has been an abuse of that discretion." *Coppola v. Commonwealth*, 220 Va. 243, 247, 257 S.E.2d 797, 801 (1979), *cert. denied*, 944 U.S. 1103 (1980)(citations omitted).

> The law presumes that . . . [an accused] can receive a fair trial from the citizens of the county or city in which the offense was committed and to overcome this presumption the defendant must clearly show that there is such a widespread feeling of prejudice on the part of the citizenry as will be reasonably certain to prevent a fair and impartial trial.

Id. at 248, 257 S.E.2d at 801.

Ascher has not overcome the presumption that sne received a fair trial in Loudoun County. Ascher introduced numerous news articles and editorials regarding the LaRouche organization and the prosecutions related to it. However, the existence of extensive pretrial publicity is insufficient, standing alone, to justify a change of venue. *Tuggle v. Commonwealth*, 228 Va. 493, 503, 323 S.E.2d 539, 545 (1984), vacated on other grounds, 471 U.S. 1096 (1985). Ascher did not clearly show that a widespread feeling of prejudice existed among the veniremen so as to prevent the possibility of a fair and impartial trial. Of the nearly eighty articles introduced into evidence, only six mention her by name. Prospective jurors are not required or expected to be completely ignorant of the facts and the issues surrounding a highly publicized case; all that is re-

quired is that a prospective juror can lay aside his or her impression or opinion and render a verdict based upon the law and evidence. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). An accused must show that publicity so influenced the citizenry that a jury could not be seated free from bias created by the publicity. Ascher failed to make any such showing. When questioned on voir dire, each juror who was seated in Ascher's case assured the court that he or she could perform as expected.

The trial court's decision to attempt to seat a jury before ruling on Ascher's motion to change venue was a proper exercise of discretion. "A court may refuse to summon a jury from another county until an ineffectual effort has been made to obtain an impartial jury from the county in which the trial is to take place." *Coppola*, 220 Va. at 248, 257 S.E.2d at 801 (citations omitted). The fact that an impartial jury was seated from Loudoun County raises a conclusive presumption that the motion for a change of venue was unfounded. *Webb v. Commonwealth*, 154 Va. 866, 872, 152 S.E. 366, 368 (1930); *Muscoev. Commonwealth*, 87 Va. 460, 461, 12 S.E. 790, 791 (1891). We find nothing in the record to cause us to find otherwise. *See Justus v. Commonwealth*, 220 Va. 971, 977, 266 S.E.2d 87, 91 (1980).

Juror Bias

Ascher contends the trial court seated jurors who were not qualified to serve because they were biased against her. She argues they were disqualified because they held preconceived opinions of her guilt based upon newspaper accounts. The record does not support Ascher's contention. The mere existence of a preconceived notion as to guilt or innocence of an accused arrived at from news articles or reports is not sufficient to establish that a juror is disqualified unless the juror cannot disregard those reports and set aside his or her notion and base his or her verdict upon the evidence presented in the case. *Washington v.*

Commonwealth, 228 Va. 535, 544, 323 S.E.2d 577, 584 (1984), *cert. denied*, 471 U.S. 1111 (1985).

The record shows that the members of the venire were carefully and extensively questioned for several days by the court, by the Commonwealth's attorney, and particularly by defense counsel. The court allowed counsel to "voir dire" the jurors in pairs in order to permit more careful scrutiny. While virtually every venire member had been exposed to some pretrial publicity, the jurors who were seated on the panel were firm in their belief that they could be impartial and could render a verdict based solely on the evidence presented at trial. While some of the jury members had unfavorable opinions about LaRouche and his organization, they had no preconceived notion about Ascher's guilt or innocence and understood that Ascher was presumed innocent until the evidence established her guilt beyond a reasonable doubt. Pretrial exposure to media coverage does not disqualify a juror who can decide a case solely from the evidence presented. *Briley v. Commonwealth*, 221 Va. 563, 570, 273 S.E.2d 57, 61 (1980), *cert. denied*, 470 U.S. 1088 (1985).

Even if some of the voir dire questions by the trial judge might be considered leading, the trial court did not coerce or persuade the jurors to acquiesce in a particular viewpoint. Rather, the questions permitted the jurors to answer questions which reflected their qualifications for impartial jury service and the point of view expressed emanated from the jurors themselves. *See Educational Books Inc. v. Commonwealth*, 3 Va. App. 384, 389, 349 S.E.2d 903, 907 (1986). "[U]nder our system it is [the trial] judge who is best situated to determine competency to serve impartially." *Patton v. Yount*, 467 U.S. 1025, 1039 (1984). The trial judge had the ability to evaluate the weight and credibility of the responses.

> [T]he trial court must weigh the meaning of the answers given in light of the phrasing of the

> questions posed, the inflections, tone, and tenor of the dialogue, and the general demeanor of the prospective juror. We are aware that, while the words employed may, when transcribed and read in retrospect, appear ambivalent, the judge who heard them uttered was uniquely positioned to assess their ultimate import.

LeVasseur v. Commonwealth, 225 Va. 564, 584, 304 S.E.2d 644, 655 (1983), *cert. denied*, 464 U.S. 1063 (1984). Because the trial judge is "uniquely positioned," his or her "decision in these matters will not be overturned 'unless we can say . . . that it was erroneous'". *Id.* The record supports the ruling of the trial judge that the jurors were not biased. Accordingly, we hold the trial judge seated a jury free from exception.

II. EVIDENTIARY ISSUES

Right of Confrontation

Ascher argues she was denied her sixth amendment right to confront her accusers as to the three counts alleging that she knowingly and willfully offered or sold securities in violation of Code § 13.1-504 to Mary Cathleene Waddell. When Waddell was called to testify, she was suffering from a speech impediment and a partial loss of memory as the result of a stroke which occurred after her dealings with Ascher. Ascher argues that Waddell's memory was so impaired that she was functionally unavailable for cross-examination which, in effect, violated her right to confront this witness. Ascher contends the counts involving Mary Cathleene Waddell, therefore, should be dismissed. We disagree.

In *Delaware v. Fensterer*, 474 U.S. 15 (1985), the United States Supreme Court stated:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will

> refrain from giving testimony marred by forgetfulness, confusion or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross examination, thereby calling to the attention of the factfinders the reasons for giving scant weight to the witness' testimony.

Id. at 21-22. Recently, the Court stated: "[t]he Confrontation Clause guarantees only 'an *opportunity*' for effective cross-examination. . . . It is sufficient that the defendant has the opportunity to bring out such matters as . . . lack of care and attentiveness . . . and even . . . the very fact that he has a bad memory." *United States v. Owens*, 484 U.S. 554, 559 (1988) (emphasis in original)(citations omitted).

Our review of Waddell's testimony reveals that Ascher was provided the opportunity to extensively cross-examine Waddell. The questions posed by defense counsel often addressed Waddell's ability to remember. Substantively, Waddell's testimony reveals that she kept fairly detailed and extensive records of her financial dealings with Ascher and with others associated with the LaRouche organization; her documents were made exhibits without objection and were appropriately referred to by Waddell to refresh her memory at trial. Many of the checks she had written, which totalled approximately $15,000, were specifically designated by her as loans. Waddell had promissory notes from the NCLC which corresponded to the checks she had written. Waddell testified that some of the money she had paid to the organization was, in fact, a contribution, although she was not able to identify the exact amount which was a gift. She was, nevertheless, unequivocal in stating that most of the money was a loan she expected to be repaid. She testified that her purpose of loaning the money to the organization was not political, but was to make an investment with a good rate of return.

Counsel for Ascher, through adroit cross-examination, successfully emphasized the weaknesses in Waddell's testimony and thereby gave the jury the opportunity to evaluate Waddell's credibility. Ascher had the opportunity, and did, in fact, confront the witnesses against her as to the counts involving Mary Cathleene Waddell. The trial court did not err by refusing to dismiss those counts in the indictment.

Admission of Letters of Deceased Lender

Ascher next assigns as error the trial court's ruling to admit into evidence letters of M. M. Brantley, who was deceased at the time of trial. Brantley had loaned over $91,000 to Campaigner Publications, Inc. in April and May of 1984 at an interest rate of twelve percent. Ascher solicited these loans from Brantley. The transaction with Brantley was not the basis of any of the indictments against Ascher. The trial court admitted Brantley's letters to prove that Ascher and her co-conspirators knew of repayment problems when they continued to solicit loans. In Brantley's letters, he claimed he was facing financial ruin and pleaded for the repayment of his money. Ascher claims the prejudice of those letters outweighed their probative value because the jury could have reasonably inferred that Brantley died as a result of his asserted desperate condition.

Brantley's letters were seized from the National Center Finance Office from a file created for correspondence from him. The promissory notes to Brantley which were also admitted into evidence had been signed by Ascher. Carol Leonard, Brantley's former personal secretary, was familiar with his signature and identified the letters which she had typed and others as having been drafted and signed by Brantley. Leonard also testified that she was a party to a three-way telephone conversation with Ascher in which Brantley demanded repayment of his $91,000 in loans which he had invested because of the higher rate of return.

Brantley's letters showed that repayment of his notes for $91,000 were from four to eight months overdue and that he had received only two payments of $100 and $2,000.

The trial court, in admitting letters which were not addressed directly to Ascher but rather to Donald Phau or Campaigner Publications, Inc., expressly relied on other evidence that when complaints were received in the Finance Office, the practice was to notify the person who solicited the loan, either by sending a copy of the letter or by [408 S.E.2d, at 915] oral communication. In Brantley's case, that was Ascher. Also, Brantley's name appeared on the weekly budget memos of William Hintz, which Hintz testified he routinely discussed with Ascher. Since the letters were admitted, not to prove the truth or falsity of their content but to show that Ascher had notice of repayment problems and complaints when she continued to solicit other loans, the letters were not hearsay. *See Fuller v. Commonwealth*, 201 Va. 724, 729, 113 S.E.2d 667, 670-71 (1960). Knowledge by Ascher that loans were not being repaid was a factor which the jury could consider in determining whether she had the *animus furandi* to make her actions criminal. The letters proved that the loans were being solicited with no intention of repayment or with the intent to defraud the investor of his or her funds and that untrue statements of material facts were employed to obtain the money. The evidence was admissible to prove Ascher's motive or criminal intent.

Furthermore, the Brantley letters and related testimony concerning the involvement of Ascher, Donald Phau, and William Hintz tended to prove the conspiracy charge. That evidence showed a scheme or agreement between Ascher and her confederates to defraud the investors and established that they had the requisite criminal intent. The letters were relevant. Their probative value outweighed any claim of prejudice.

Alternatively, Ascher argues that, if the portions of Brantley's letters which showed him to be in desperate financial straits had been redacted, the remaining portion of the letters would have served equally well to prove that Ascher had notice that loans were not being repaid. We disagree. Brantley's financial condition was relevant to the issue of notice and was crucial to fully understand Ascher's intent. That evidence made clear to the fact finder that Ascher understood and intended the consequences of her actions. Furthermore, those portions of Brantley's letters were inseparable from the text and would have considerably altered the nature of the notice which Ascher and others received.

Where evidence has little or no probative value and has the potential for being very prejudicial, such as showing unrelated crimes, it is error for the trial court not to redact the prejudicial evidence, unless the evidence is inextricably connected the other evidence or to do so would mislead the fact finder. *Pierce v. Commonwealth*, 2 Va. App. 383, 391, 345 S.E.2d 1, 5 (1986). Where the "objectionable portion of the statement [could] easily be separated from the remainder of the admission without adverse effect," it is error for the trial court not to do so, and if the prejudice caused by admitting the evidence outweighs its probative value, the error will be reversible. *Id.*

However, such is not the case here. The evidence Ascher seeks to have excised was highly relevant because it showed that Ascher and others in the LaRouche organization with whom she allegedly conspired knowingly and willfully continued to solicit money knowing that they were not able to repay the loans.

Accordingly, the trial court did not err by admitting Brantley's letters in the form presented.

III. JURY INSTRUCTIONS

Definition of a Security

Ascher claims the instruction to the jury attempting to define a security was inadequate. She argues the instruction provided the jury with no understanding of the law sufficient for the jury to decide whether the promissory notes given by Ascher or at her direction to the lenders were, in fact, securities. The jury instruction told the jury that all promissory notes are securities. Ascher argues that many promissory notes are, in fact, not securities. Ascher contends the court should have given the instruction which she offered, or one comparable, which would have told the jury when a promissory note [408 S.E.2d, at 916] is not a security in order that the jury could have determined whether the notes at issue fell in the category of a security.

"Securities" are often defined in various references by merely giving examples of the numerous instruments which are commonly known as securities. However, securities are "[e]vidences of obligations to pay money . . . instruments giving to their legal holders rights to money or other property; they are therefore instruments which have intrinsic value and are recognized and used as such in the regular channels of commerce." Black's Law Dictionary 1354 (6th ed. 1983). The jury instruction which the court gave defining a security as a note or other evidence of indebtedness was taken verbatim from the definition of a security contained in Code § 13.1-501 of the Virginia Securities Act.[4] Instruction 17 from the court provided:

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[4] Code 13.1 501 reads:

"Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate of subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; oil, gas or

> The term "security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate of subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The instruction was a correct statement of the law. However, the duty to properly instruct the jury is not always "discharged . . . by reading the applicable statute to the jury." *Dowdy v. Commonwealth*, 220 Va. 114, 116, 255 S.E.2d 506, 508 (1979) (citing *U.S. v. Harris*, 346 F.2d 182, 184 (4th Cir. 1965)).

The question which Ascher raises is whether the court erred by failing to provide the jury with a more complete definition which would provide them with the standard needed to determine whether the promissory notes were non-securities. We hold the instruction was adequate because, on these facts, there is no context in which the

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other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. However, this definition shall not apply to any insurance policy, endowment policy, annuity contract, variable annuity contract or any contract or agreement in relation to and in consequence of any such policy or contract, issued by an insurance company subject to the supervision or control of the Commission's Bureau of Insurance when the form of such policy or contract has been duly filed with the Bureau as now or hereafter required by law.

jury could have found the notes at issue not to have been securities within the proscriptions of Code §§ 13.1-520 and 13.1-501. Therefore, there were no facts to support the giving of Ascher's proffered instruction or a comparable instruction defining when a promissory note or evidence of indebtedness is not a security.

> A reviewing court's responsibility in reviewing jury instructions is "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises." . . . [A] jury must be informed as to the essential elements of the offense; a correct statement of the law is one of the "essentials of a fair trial."

Darnell v. Commonwealth, 6 Va. App. 485, 488, 370 S.E.2d 717, 719 (1988) (citation omitted).

Ascher does not challenge that the trial court properly instructed the jury as to the elements of securities fraud. The gravamen of the offenses charged under Title 13.1 is the intent to knowingly and willfully [408 S.E.2d, at 917] violate the provisions of the statute as provided in Code § 13.1-520(A). *See* fn. 1, *supra*. The jury was required to determine, upon being presented with the appropriate definitions and elements, whether Ascher had the requisite intent to defraud. Thus, if the definitional instruction of a security was adequate, the instructions allowed the jury to determine whether Ascher violated Code § 13.1-520(A).

In general terms, we agree with Ascher that the instruction given by the trial court, although a correct statement of the law, may in other circumstances have been insufficient to define when a commercial instrument is or is not a security. However, on the facts in this record, no elaborative instruction was necessary because there was no theory or basis which would have permitted the fact finder to conclude that the notes or evidence of indebtedness were not securities.

The Virginia Securities Act is, by design, very broad in its scope and coverage. "[F]ederal courts have construed broadly the disclosure and regulation requirements of the federal [Securities] Acts. As a corollary, they read narrowly the exemption provisions. . . . We believe Virginia's Act should receive similar construction." *Pollok v. Commonwealth*, 217 Va. 411, 413, 229 S.E.2d 858, 860 (1976)(citation omitted). *See Reves v. Ernst & Young*, 110 S. Ct., 945, 949 (1990) ("in defining the scope of the market that it wished to regulate, Congress painted with a broad brush"). In *Reves*, a unanimous Court acknowledged the well-recognized legislative intent to provide broad coverage for regulating securities and, based upon that intent, broadly defined "a note" as found in the definition of "security," terms common to both the federal and Virginia statutes.[5] The *Reves* Court established a three-step approach in determining when a note is a security, which analysis begins with a focus on the language of the statute: "[A] note is *presumed* to be a 'security.' " *Reves*, 110 S. Ct. at 952 (emphasis added). Similarly, we hold that under the Virginia Securities Act, a promissory note is presumed to be a security.

The presumption that a note is a security may be overcome by showing that the instrument does not have the characteristics or qualities of a security. "[T]hat presumption may be rebutted *only* by a showing that the note bears a *strong* resemblance . . . to one of the enumerated categories of instrument," which the Court declared were notes that did not have the character of a security. *Reves*, 110 S. Ct. at 952 (emphasis added). The *Reves* Court defined a non-exclusive list of notes issued as part of commercial financing arrangements, which had been previously enumerated by the Second Circuit in *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1138 (2nd

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[5] *See* Code § 13.1 501, fn. 1, *supra*. For the virtually identical federal definition, *see Reves*, 110 S. Ct. at 948.

Cir. 1976), and expanded by that Court in *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 939 (2nd Cir.), *cert. denied*, 469 U.S. 884 (1984). Those notes, which are generally non-securities, include:

> the note delivered in consumer financing, the note secured by mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a "character" loan to a bank customer, short-term notes secured by an assignment of accounts receivable, a note which simply formalizes an open-account debt incurred in the ordinary course of business . . . and "notes evidencing loans by commercial banks for current operations."

Reves, 110 S. Ct. at 951 (citation omitted). The notes which Ascher offered or sold do not resemble any of the notes defined in *Reves* as not constituting a security.

"If an instrument [specifically a note] is not sufficiently similar to an item on the [408 S.E.2d, at 918] list, the decision whether another category should be added is to be made." *Reves*, 110 S. Ct. at 952. The Supreme Court identified in *Reves* four characteristics which are common to the specified notes that are not securities, and which should be considered in determining which other notes are non-securities. Thus, if a promissory note does not resemble any of those commonly recognized commercial instruments which are not considered securities, the court must consider and decide whether the note may fall within a broader definition of a promissory note that is not a security.

The first factor is "the motivations" which would influence the buyer's and seller's decision in entering into the transaction. If the seller is raising operational funds for

an enterprise and the buyer is interested in profit,[6] the instrument is most likely to be a "security." *Reves*, 110 S. Ct. at 952. The second factor is the "plan of distribution" set up for the notes. *Id.* Offering notes to a "broad segment of the public" is all that is necessary to establish the "requisite 'common trading'" to qualify the noter as a security. *Id.* at 953. The third factor is the "reasonable expectations of the investing public." *Id.* at 952. Where the public reasonably perceives the instrument to be an investment, this factor alone qualifies it as a security even when an economic analysis of those circumstances unique to a transaction would suggest that the note is not a security. *Id.* at 953. The fourth factor is whether there exists some other "regulatory scheme" applicable to the transaction or instrument which would "significantly" reduce the risk to the buyer or to the public of such an investment if the securities act did not control. Examples of such regulatory schemes include the federal deposit insurance corporation and federal banking laws. *Id.* at 952-53.

The facts in the *Reves* case are sufficiently similar to those here to be instructive. Ernst & Young made no claim that the promissory notes which had been issued by a farmer's cooperative to raise general operations funds bore a family resemblance to any of the enumerated categories of notes which are considered non-securities. Neither does Ascher. In *Reves*, the Supreme Court had to determine whether there had been a sufficient showing that the notes failed to meet the criteria for those notes which are considered securities so that they could be classified as non-securities.[7]

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[6] The Court emphasized "that by 'profit' in the context of notes we mean 'a valuable return on an investment,' which undoubtedly includes interest." *Reves*, 110 S. Ct. at 952n.4.

[7] Since formulating this test in 1976, the Second Circuit has added to its list of notes which do not resemble securities only once, in

Applying the "motivations" criterion, the Court in *Reves* observed that the notes were issued "in an effort to raise capital for its general business operations, and purchasers bought them in order to earn a profit in the form of interest." *Id.* at 952. The same is true with all the notes issued by Ascher. Ms. Waddell's notes (counts seven through nine) were for eight percent and six percent interest per annum. She testified that this rate of return was greater than that which she was making and a significant factor in her investment decision. The notes sold to Dr. Allen (count 11) paid interest ranging as high as twelve percent to fifteen percent per annum. Some of the notes he purchased with money from his self-directed pension fund were required by law to be investments from which he would realize a profit. The notes which Ascher and her confederates issued to Robert Ware (count four) paid commercially competitive interest rates, which he testified was a factor in his investment decision. Ascher told Larry Burchett (count ten) that the corporations paid prevailing interest rates on the promissory notes. In her recorded sales presentation to Mr. Burchett, Ascher consistently referred to the operational use of the loan proceeds. There came a time in late 1985 when a ceiling was established, whereby no more than forty percent of the operational [408 S.E.2d, at 919] expenses of the organization could come from loans. Prior to that, sixty percent of the operational expenses were paid with the proceeds from the sale of notes. Thus, the evidence shows that all the lenders were investing with an expectation of a return of principal and interest, and the organization was using this method to generate operational capital.

As to the "plan of distribution" factor, the Court in *Reves* observed that notes were offered to non-members as well as members of the issuing co-operative. The fact

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Chemical Bank v. Arthur Anderson & Co., 726 F.2d 930 (2nd Cir.), *cert. denied*, 469 U.S. 884 (1984).

that the notes were not sold or offered for sale on an open exchange was not the controlling factor. The significant fact was that the notes were offered for sale to a "broad segment of the public." *Reves*, 110 S. Ct. at 953. The distribution scheme here involves a much broader segment of the public than did the plan in *Reves*. By March 1985, Ascher and her organization had marketed more than $10 million in promissory notes to over 2,000 people throughout the United States. By December 1985, the amount of money raised by loans had grown to $30 million.

Regarding the "public perception" factor, in *Reves* the co-operative characterized the notes as investments and stressed that they were "safe" and "secure." *Id.* at 948. "In these circumstances, it would be reasonable for a prospective purchaser to take the Co-Op at its word." *Id.* at 953. Here again, Ascher sold the notes as "investments," and safety and a history of repayment was consistently stressed by her and relied upon by the investors.

As to whether the notes were subject to "alternative methods of regulation," the Court in *Reves* observed: "[F]inally, we find no risk-reducing factor to suggest that these instruments are not in fact securities. The notes are uncollateralized and uninsured. Moreover . . . the notes here would escape federal regulation entirely if the Acts were held not to apply." *Id.* That description of the promissory notes also applies to the notes which Ascher issued on behalf of NCLC. But for the regulatory scheme imposed by the Virginia Securities Act through the State Corporation Commission, there would be "no risk reducing factor" or "substantial regulation" of these notes, which were being aggressively marketed to investors nationwide by phone and personal contact.

In sum, no evidence exists from which a fact finder could reasonably have found that Ascher overcame the presumption that the notes at issue were securities. Having not presented any evidence to overcome that *prima*

facie presumption, she was not entitled to an instruction to the jury, other than the one given by the trial court, which would have permitted the jury to have found the notes resembled any of the instruments not common to a security.

Concert of Action

Ascher's final assignment of error is that the trial court incorrectly granted a concert of action instruction, which stated:

> If there is concert of action with the resulting crime one of its incidental probable consequences, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of the resulting crime.

Ascher's contention is that the instruction abrogates the necessity that the Commonwealth prove that she agreed with others to commit an illegal act. In other words, Ascher argues, based on this instruction, the jury was allowed to find her guilty of a conspiracy without also having to find that she had agreed to sell or offer for sale notes in violation of the Virginia Securities Act.

It is not necessary that we rule on the merits of this argument because the evidence is that Ascher and others agreed to issue notes to lenders in exchange for money loaned to various organizations. No factual controversy existed that Ascher and others agreed to perform these acts in concert with one another. Ascher does not [408 S.E.2d, at 920] challenge that she agreed with others to issue on behalf of NCLC promissory notes in exchange for money loaned. She admits that was the purpose and function of her fund-raising efforts, and she and others undertook and agreed to do so. All of the testimony and exhibits pre-

sented at trial establish that Ascher did act in agreement with her confederates.

She contended at trial that her agreement was not a conspiracy because it was not an agreement to do an illegal act in violation of Code § 13.1-502. She argued that the notes were not securities and, even if they were, she and the others did not intend or employ a scheme to defraud or obtain money by means of any untrue statement of a material fact or engage in a transaction or course of business which operates as a fraud in violation of Code § 13.1-502. As previously noted, Ascher's acts in continuing to solicit loans knowing that the obligations could not be repaid and misrepresenting the repayment history, among other factors, were sufficient to prove a conspiratorial intent or scheme to defraud others.

Assuming that the concert of action instruction should not have been given, which we do not hold, it did not relieve the Commonwealth of proving that Ascher agreed with others to commit acts which were criminal. The jury was clearly told in Instruction 32 that the Commonwealth had to prove beyond a reasonable doubt that Ascher agreed with others to offer or sell a security with the intent to defraud the purchasers. The three conspiracy instructions granted were clear and unequivocal in requiring that the jurors find that Ascher was part of an agreement.[8] The

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[8] The Conspiracy instructions were as follows:

Instruction No. 32:

Defendant has been charged with the crime of conspiracy to offer or sell a security with the intent to defraud the purchaser.

The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) that the defendant entered into an agreement with one or more other persons; and

(2) that the agreement between the defendant and at least one other person was that they were to unlawfully offer or sell a security with

concert of action instruction, like Instruction 33, was then given to address the *liability* of the conspirators if the jury found a conspiracy existed. It allowed the jury to find Ascher criminally liable for the conduct of her cohorts "connected with the consummation of the resulting crime," which were the same acts as those committed "in furtherance of the conspiracy." Because the jurors were required to find an agreement before determining Ascher's liability, we conclude there was no error.

IV. CONCLUSION

Because we find no error in the judgment of the trial court, we conclude that Ascher received a fair trial by an

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the intent to defraud the purchaser of such security; and

(3) that such agreement contined during some period between August 18, 1985 and March 30, 1987; and

(4) that the agreement was made, in whole or in part, or an act in furtherance of this agreement took place in whole or in part in Loudoun County, Virginia.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the elements of the offense as charged, then you shall find the defendant guilty and fix her punishment at a specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or confinement in jail for a specific time of not more than twelve (12) months and/or a fine of a specific amount, but not more than $1000.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

Instruction No. 33:

If you find that the Commonwealth has established beyond a reasonable doubt that the defendant was a member of a conspiracy, she is responsible for the acts of other members of that conspiracy which are committed in furtherance of the conspiracy, even if such acts are committed without her direct knowledge.

Instruction No. 34:

A conspiracy cannot exist unless criminal intent is shared by the minds of at least two people.

impartial jury in the Circuit Court of Loudoun County. Her convictions are, accordingly, affirmed.

Affirmed.

A Copy,

Teste:

Patricia G. Davis

By:

Deputy Clerk

VIRGINIA:

Record No. 911774
Court of Appeals No. 1011-89-4

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 11th day of March, 1992.

Rochelle Joyce Ascher,

Appellant,

against

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

Justice Keenan took no part in the consideration of this case.

A Copy,

Teste:

David B. Beach, Clerk

By: Richard Buriak
Deputy Clerk

VIRGINIA:

Record No. 1011-89-4
Circuit Court Nos. 5362 and 5977

In the Court of Appeals of Virginia on Wednesday the 25th day of July, 1990.

Rochelle Joyce Ascher,

Appellant,

against

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Loudoun County

Before Judges Baker, Duff and Cole

This petition for appeal is granted in part and denied in part. And an appeal is awarded to the petitioner from a judgment of the Circuit Court of Loudoun County, dated June 19, 1989, with respect to the following questions:

1. Was it an abuse of discretion to deny the change of venue?

2. Was it an abuse of discretion to seat the jury?

6. Was it error not to dismiss counts seven through nine (M. Cathleene Waddell) when the "victim" witness was unavailable for cross-examination?

8. Did the trial court err when it admitted the correspondence of a dead man?

10. Did the trial court err when it instructed any "note" or "evidence of indebtedness" was a "security" (Instruction No. 17)?

12. Did the trial court wrongly instruct the jury that it could consider "concert of action" (Instruction No. 35)?

Appeal bond or an irrevocable letter of credit in the amount of $500 shall be posted as required by Code § 8.01-676.1(B). The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal is denied for the following reasons:

Issue 3: Juror Seeley reported an incident that occurred to him at lunch. The trial court, out of the presence of the jury, called Seeley as a witness and asked him to explain what happened. Seeley explained that a gentleman, whom he pointed out in the courtroom and was identified as the defendant's husband, sat down next to him in the diner with a copy of EIR and "made it a little obvious what the paper was." Seeley turned his head and asked for his check. He made no comment and reported the incident to the bailiff as he had been instructed to do. Seeley did not recall the contents of the paper and said the incident would have no effect upon him. He told one other juror about the incident, but only stated to her that the incident had occurred. The trial judge made a factual finding that no prejudice occurred to either the Commonwealth or to the defendant. We find no merit to this contention of the defendant. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Bradshaw v. Commonwealth*, 228 Va. 484, 492, 323 S.E.2d 567, 571 (1984).

Issue 4: The appellant contends that she had insufficient notice of the nature and cause of her accusation, thereby exposing her to trial by ambush. The charges are clearly set forth in the indictments and the trial court granted

the defendant's request for a bill of particulars. The appellant has not pointed out with any specificity where the indictments were deficient. We find no merit to this contention. *See Clinebell v. Commonwealth*, 3 Va. App. 362, 365, 349 S.E.2d 676, 678, *aff'd in pertinent part*, 235 Va. 31, 368 S.E.2d 263 (1988).

Issue 5: The appellant contends that the trial court erred when it restricted cross-examination of the government's principal insider witness. No ruling of the trial court will be considered as a basis for reversal unless the objection is stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Rule 5A:18. The petition for appeal must state the question presented and conform in form and contents to the opening brief of appellant. Rule 5A:12(c). The opening brief of appellant must state a clear and concise statement of the facts that relate to the question presented, with references to the pages of the transcript. Rule 5A:20(d). Counsel is required to "lay his finger on the error." Only errors so assigned will be noticed by this Court. *See Omohundro v. County of Arlington*, 194 Va. 773, 778, 75 S.E.2d 496 (1953). The appellant has not complied with these rules in stating this issue and we refuse to consider it. Rule 5A:18.

Issue 7. The appellant contends that the prosecution failed to produce *Brady* material. She has not set forth with any specificity what material was not disclosed. Certain documents were presented to the trial court for examination in camera, and he determined that no exculpatory material was contained therein. We have reviewed these documents which were sealed in the trial court and examined in camera, and conclude also that no exculpatory material is contained therein. We find no merit to the contention that *Brady* material was not disclosed.

Issue 9: The appellant contends that the trial court impermissibly put questions to the defendant. After Ascher

completed her testimony, a juror tendered to the trial judge two questions to be answered by her. The trial judge permitted Ascher to return to the witness stand and answer the questions. He also permitted follow-up questions by both the defense and the Commonwealth. The defendant agreed to this procedure in advance and, thus, waived any objection to the procedure. Rule 5A:18.

Issue 11: The appellant contends that an instruction given by the trial court was in error because allegations in a bill of particulars must be sustained even if unnecessary. We find no merit in this contention.

A Copy,

Teste:

Patricia G. Davis, Clerk

By:

Marty K.P. Ring

Deputy Clerk

CERTIFICATE OF CLERK

I, Patricia G. Davis, Clerk of the Court of Appeals of Virginia, do hereby certify that on July 25, 1990 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the trial court indicated in the order and to all counsel of record.

Given under my hand this 26th day of July, 1990.

Patricia G. Davis, Clerk

By: Marty K.P. Ring
Deputy Clerk

IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE COUNTY OF LOUDOUN, VIRGINIA

TO WIT: JULY 31, 1990.

THE FOREGOING ORDER WAS THIS DAY RECEIVED IN SAID OFFICE AND RECORDED.

Joyce M. Long
DEPUTY CLERK

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

CRIMINAL NO. 5362, 5977

COMMONWEALTH OF VIRGINIA

vs.

ROCHELLE JOYCE ASCHER

ORDER

The 6th day of June, 1989, came John B. Russell, Jr. and George W. Chabalewski, Attorneys General for the Commonwealth, who act herein as Assistant Commonwealth's Attorneys, and also came the defendant, ROCHELLE JOYCE ASCHER, who stands convicted of felonies, to-wit: 8 counts of securities fraud (Criminal No. 5362) and conspiracy (Criminal No. 5977), and who came as a condition of her bond, also came John P. Flannery II, counsel for the defendant herein.

This case came on this day for hearing on pending motions and sentencing.

The Court heard argument and ruled on said motions as indicated in the record.

The Probation and Parole Officer of this Court, to whom this case had been referred for a pre-sentence report, appeared in open Court with a written report, copies of which report had been filed with the Court, the Attorney for the Commonwealth, and defense counsel more than five days before this hearing date. A formal reading of the report was waived by all counsel as well as cross-examination of the said Probation and Parole Officer.

The Commonwealth presented evidence on sentencing.

Defense counsel called for John B. Russell, Jr. to testify, the Commonwealth objected. Upon conclusion of argument, the Court denied the motion.

The Court reviewed the sentencing memorandum filed by defense counsel and then heard argument on sentencing.

Upon conclusion of all the evidence and argument of counsel in regard thereto, the Court demanded of defendant if anything she had or knew to say why judgment should not be pronounced against her according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant, Rochelle Joyce Ascher (DOB 4/1/49), be and she is hereby sentenced to confinement in an institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 8 years; as to the charge contained in Count 1 of the indictment in Criminal No. 5362, to confinement in an institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 10 years; as to the charge contained in Count 2 of the indictment in Criminal No. 5362, to confinement in an institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 9 years; as to the charge contained in Count 4 of the indictment in Criminal No. 5362, to confinement in an institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 10 years; as to the charge contained in Count 7 of the indictment in Criminal No. 5362, to confinement in an institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 10 years; as to the charge contained in Count 8 of the indictment in Criminal No.5362, to confinement in an institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 10 years; as to the charge contained in Count 9 of the indictment in Criminal No. 5362, to confinement in an

institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 10 years; as to the charge contained in Count 10 of the indictment in Criminal No. 5362, to confinement in an institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 9 years; as to the charge contained in Count 11 of the indictment in Criminal No. 5362, to confinement in an institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 10 years; as to the charge contained in the indictment in Criminal No. 5977, to confinement in an institution operated by the Director of the Department of Corrections of this Commonwealth for a period of 10 years. It is ORDERED that the sentences imposed in Counts 4, 7, 8, 9, 10, and 11 in Criminal No. 5362, and the sentence imposed in Criminal No. 5977 run concurrently each with the other. It is further ORDERED that the sentences imposed in Counts 1 and 2 in Criminal No. 5362, and the sentence imposed in Criminal No. 5977 run concurrently each with the other, and that the Commonwealth do recover against the defendant its costs by it about its prosecution in this behalf expended in the amount of $33,085.60.

Finding it in the public interest so to do, the Court doth suspend the execution of said sentences imposed as to Counts 1 and 2 in Criminal No. 5362, and that imposed in Criminal No. 5977 for a period of 10 years on the following terms and conditions:

1. The defendant shall serve ten (10) years on supervised probation under the standard terms and conditions of probation, said supervised probation to begin upon release from confinement.

2. The defendant shall maintain forty (40) hours per week of regular employment, and pay ten percent (10%) of her gross income in restitution, said restitution to be paid through the Clerk of this Court in

accordance with a schedule to be established by the Probation and Parole Officer upon the defendant's release from confinement after Court hearing as to the appropriate recipient of said restitution.

3. The defendant shall not engage in any solicitation of funds for any purpose and sell no real or personal estate other than by over-the-counter retail sales.

4. The defendant shall pay the costs of these proceedings in accordance with a schedule to be established by the Probation and Parole Officer upon the defendant's release from confinement.

The Commonwealth moved to withdraw certain exhibits, to which motion defense counsel did not object, subject to review of the copies to be substituted. The motion was granted.

The Court directs the Clerk to retain the transcripts of this case for review by the Court for its determination concerning what action it may take against defense counsel for misconduct during this trial.

Defense counsel requested bail pending appeal, the Court ruled as follows:

"The Court has referred to the lengthy sentences involved. Despite the fact that these were jury sentences, the Court has taken substantial liberty with them. I find that the defendant has ten years to serve and another ten years on probation, with another ten years to serve if she violates the terms of probation.

I find further that the conduct of the defendant was willful, and even today it appears that she expresses no remorse.

I find further that this is not a circumstantial evidence, but one in which we have direct evidence from numerous victims, which compel this Court to find that the evidence of guilt is overwhelming.

This is not a situation where somebody has been merely arrested on a charge, or has been indicted. This case has been fully tried, very fully tried, to a jury of this county. The jury has spoken, and the Court will deny bail pending appeal in this matter for those reasons."

Defense counsel moved the Court to suspend execution of this sentence pending the result of the appeal. The motion was denied.

And the defendant is remanded to the custody of the Sheriff to be held in the Loudoun County Adult Detention Center pending appeal if consistent with jail policy.

ENTER: 19 June 1989

Carleton Penn
Judge Designate

A Copy Teste
F.R. Howard, Clerk

By John Fishback
Deputy Clerk

TRIAL TRANSCRIPT EXCERPTS OF COLLOQUYS RELATING TO DISPUTED JURY INSTRUCTIONS
(definition of securities, etc.)

* * * *

[3/24/89 **Page 22**] Your Honor, I don't know what you want for the record, but maybe it would be best to keep this in the record. We'll keep a note of it and we'll provide the Court with a clean copy and you . . .

THE COURT: All right. 10?

MR. FLANNERY: No objection, Your Honor.

THE COURT: Grant. Objection as to 11?

MR. FLANNERY: I don't think it applies in this case, Your Honor. Whether such crime was originally contemplated or not, gives me a special pause.

I don't see how, under the circumstances of this case as the evidence is given, that you can give the charge as to concert of action, stating that Mrs. Ascher would be liable whether such crime was originally contemplated or not.

I mean, that contradicts the very notion, from common law to the present, that she had formed an intent and knew exactly what she's doing. I think this is objectionable.

And, in particular, the facts of this case, [**23**] it's misleading to the jury as to what its burden is.

THE COURT: This comes out of a 1986 case . . .

MR. FLANNERY: I saw it, Your Honor, and I was surprised about it. Because it seems to me to be bad law. To be telling . . .

THE COURT: Well, good or bad, we're stuck with it, Mr. Flannery.

MR. FLANNERY: Well, we may be stuck in another way. I find it very troubling to be instructing a jury that

you can hold Mrs. Ascher responsible whether such crime was originally contemplated or not because it occurs . . . it happens to occur in sequence after the fact.

I think that that's bad law and if, in fact, the case says that, I think that's bad law. And I think it would be reversed.

It certainly is a contradiction with knowingly and willfully, the other instructions we've given. I don't know how a jury resolves those two distinctions. That on the one hand they're instructed to do something . . . to consider whether Mrs. Ascher did something knowingly and willfully, that is [24] deliberately and not by accident. And then we have an instruction that says, whether such crime was originally contemplated or not, you can hold her responsible for it.

That seems to fly in the face of the sense of knowingly and willfully committing an offense.

THE COURT: For the Commonwealth?

MR. RUSSELL: Your Honor, I think this is an accurate statement of the law, as it has been. And I think it's consistent, not only with our other instructions but with the way the law has been for some time.

That when people are acting in concert, that once they start a chain of events in motion, a Defendant is responsible for the actions of the others with whom she's acting in concert once those actions are a natural and probable result.

So, I think this is not a change in the law. I think the law has always been this way.

THE COURT: The Court believes Mr. Flannery is correct with respect to the misrepresentation, because that occurs at the time. [25] And also the offer and sale of an unregistered security or a sale by an unregistered broker/dealer

occurs at the time. It's not like the situation where maybe a killing occurs in the commission of a robbery.

However, insofar as the conspiracy case is concerned, why isn't this a proper instruction, Mr. Flannery?

MR. FLANNERY: Well, in a conspiracy case, I think the conspiracy charge, even given the differences between the Commonwealth and the defense, requires that there be a criminal agreement that involve two or more persons, that Mrs. Ascher join that agreement and she can't join that agreement after a crime has been committed. That's the security principal in Virginia.

She has to have joined it at some point before the crime occurs. And the Commonwealth either does or does not have that evidence to show that she knowingly and willfully became a member of that conspiracy.

And the concert of action in the conspiracy charge, I think, is at odds with this instruction, as [26] well. Because if she cannot become a member of a conspiracy after a crime has been completed and it must be in contemplation that a crime be completed, whether or not one is completed and that she be joined in that agreement.

So, I think that instruction is at odds with the instructions about willfully and knowingly and the instruction on conspiracy, as I think the Court will finally give it and, even as the instructions are found in the Virginia model instructions.

THE COURT: The Court will grant this as touching upon the conspiracy charge.

MR. FLANNERY: Can I simply respond to the Court's concern as to the misrepresentation? That is only one of three possible ways of violating . . . three possible acts which violate 502.

THE COURT: Well, I use that term generically, referring to the other language of those counts.

MR. FLANNERY: But Your Honor, the Paragraph C, which is the course of business, is certainly not a one time, one person event. A [27] misrepresentation may be, but a course of business or a scheme to defraud is not a one person, one time event. And those are both ways of violating 502.

THE COURT: Well, I'm going to give the instruction and not limit it in its application.

MR. FLANNERY: May I make one observation . . .

THE COURT: I'll grant the instruction.

MR. RUSSELL: Thank you.

THE COURT: Noting your objection.

MR. FLANNERY: Thank you, Your Honor.

THE COURT: 12, excessive and before the fact? That's out of the book. Do you object?

MR. FLANNERY: Let me just glance at it a second, Your Honor. I have no objection to that, Your Honor.

THE COURT: It's granted.

MR. FLANNERY: If you could [28] just give me a moment so I can make a note of my own.

THE COURT: 13?

MR. FLANNERY: I'm sorry, Your Honor. I object, I don't believe that's the law. And there's . . . I think the fact that there's no citation to this that's supportive of that view, it's meaningless to accuse her of willfully and knowingly committing something that she doesn't know was offered for sale or selling it as a security.

And, indeed, Your Honor, it contradicts their own Bill of Particulars. Their Bill of Particulars states that the failure of the Defendant to register was knowing and willful. And they further . . . the failure of the Defendant was

knowing and willful and that the Defendant was required to register and her failure to do so was an effort to avoid scrutiny and detection by the State Corporation Commission of law enforcement authorities in Virginia and other jurisdictions.

So, the Bill of Particulars, expanding upon the vague charges in the indictment, states that it was a part of her scheme to consciously and knowingly not register herself and to consciously and knowingly [29] not register her securities.

So, whatever the law might have been in other cases, we've been put on notice and prepared for this trial, that the knowledge in this case is that she knew to register not herself and not the securities and that was part of her scheme. She was withholding that information to deceive these, quote, investors, as the Commonwealth calls them in their Bill of Particulars.

THE COURT: For the Commonwealth?

MR. RUSSELL: Yes, sir, Your Honor. There is no cite because this is a securities prosecution and is not the subject of a great deal of law in Virginia.

However, the commonly recognized treatise on state securities laws by Professor Long, clearly states that it is irrelevant to the willfulness requirement whether a Defendant understands that what the offeror sold was a security or that the Securities Act requires the interest offered or sold to be registered.

Now, I'll be glad to provide this to the [30] Court. In the middle of that page, that is a consistent interpretation of the Uniform Securities Act.

THE COURT: What you're saying then is that ignorance of the law is no excuse.

MR. RUSSELL: As far as the fact that . . . yes, sir.

THE COURT: All right, Mr. Flannery.

MR. FLANNERY: Not for me, Your Honor. The Commonwealth always emphasizes the unlawful act portion of what makes this a securities fraud. Section 528, 13.1-528 says that an unlawful act under the Securities Code committed with underlying intent to defraud, makes this a felony. The unlawful act by itself is only a misdemeanor.

So, they have taken the unlawful act, isolated it, quoted Mr. Long for that, ignoring the current case that said you don't have to have knowledge that it has to be registered for an unlawful act.

They, in their Bill of Particulars, expanded upon their theory of the case, as per the Court's [31] order back in May of 1987. And when they expanded upon it they said that she had willfully and knowingly failed to register herself and securities. They failed to register, as part of the scheme to defraud, the individual.

That is, as I understand their theory, to conceal from the State Corporation Commission what they had, for did the State Corporation Commission know what they had, the State Corporation Commission would have put an end to this.

So, they have made it a part of their case. And they're on notice in pleadings that the knowledge in this case is that she knew that these were securities. And they made that part of the fraud portion which makes this a felony.

So, this case . . . knowledge in this case, whatever it might be in any other case, as defined by the Bill of Particulars this indictment by the fraud statute, which is not what they're showing you there as I understand it, they're just talking about registered securities. We're talking about a fraud which consists of an unlawful act.

And they say that unlawful act is connected [32] to the fraud because she knowingly and willfully withheld that information. Otherwise they'd be just charging her with misdemeanors.

And we do suggest later that that's a lesser included offense that should be charged. But just on this charge here, there is no authority for this and it's contrary to the Bill of Particulars in this case and it's highly prejudicial and misleading to the jury for that reason and it overlooks the fact that this is a fraud indictment . . . a fraud felony charge under the securities statute. And we're not talking about a simple registration here. We're not talking about a civil proceeding.

THE COURT: The Court will take that instruction under advisement. 14? There's a little misspelling of securities on the first line.

MR. FLANNERY: Yes. Well, as to intent to defraud, they mix apples and oranges here. Which is, they do not describe how one demonstrates intent to defraud in terms of the elements of that.

And in this regard, I would direct the Court's attention to the defense's definition. The

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[42] discusses the intent to defraud. The next two paragraphs discuss what circumstantial evidence is about.

So, if the jury listens carefully to this, they're not going to know anything more when they hear the end of it, about intent to defraud. And they may know something more about circumstantial evidence otherwise stated more correctly.

I direct the Court's attention to our instruction at Page 15 on this. Nowhere in that first paragraph is there any reference to materiality, is there any reference to the Defendant knowingly and willfully making a false representation or withholding information that is material.

Nowhere is there any statement that she had to know it was false or that she knew of the information that she was accused of withholding. Nowhere is it stated that she

intended to deceive, and nowhere is it stated that the person relied on what she said, which is critical. Because otherwise the statement or misstatement or fraudulent statement is irrelevant.

The Commonwealth says that the securities law [43] says, look to the context . . . that fraud law says look to the context. Exactly correct. We agree about that. And the context here is making a representation to someone who, by an alleged security, based on representations or withholding of material information.

If a person didn't know they were withholding material information, if they didn't know what the material information was, then it's not a fraud. There's no intent to defraud.

If the person is not relying on what you're saying, there's no reason objectively to think they're relying on what you're saying, then there's no fraud.

You have to know it, it has to be material, it has to be stated, the person has to rely on it. All of these elements are found in fraud law. It's Hornbook law whether it's securities fraud or its fraud by pretense or any of these other statutes. The elements are the same.

The context change and in this context the Commonwealth, as to its instruction to intent to defraud, has not spelled it out even in their own [44] citations they've drawn.

THE COURT: All right, sir, I take this under advisement.

MR. FLANNERY: Yes, Your Honor.

THE COURT: Page 15, the code definition of security?

MR. FLANNERY: Well, if one is . . .

THE COURT: Do you object?

MR. FLANNERY: Yes, Your Honor. If one is going to quote from the Code and you're going to read the defi-

nition section of a security, then you can read the whole section. I mean I . . .

THE COURT: Even as to insurance regulations which are irrelevant?

MR. FLANNERY: Well, my instructions differed in that, but if you're going to read a whole section saying what the security is, then you read the whole section, it seems to me.

THE COURT: That's the ground of your objection?

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[46] fully discusses the point made by the . . . or attempted to be made by the Commonwealth.

THE COURT: The nature of the fraud and so on?

MR. RUSSELL: Yes, sir.

THE COURT: All right.

MR. RUSSELL: Thank you.

THE COURT: Thank you, I appreciate that help.

Now, we have next for consideration the instruction on Page 16.

MR. FLANNERY: I do object to that, Your Honor.

THE COURT: All right, state the grounds of your objection.

MR. FLANNERY: Well, the Commonwealth has asked the jury to consider whether or not one of the items in that definition are present in this case and then goes on to presume what they are.

I think that the appropriate way to do the instruction is to, first of all, we have another instruction I'd like the Court to read in conjunction with [47] this one.

THE COURT: What number is yours that relates to this?

MR. FLANNERY: It's Page 11, Your Honor.

THE COURT: Page 11?

MR. FLANNERY: Page 11 of our instructions. And what might be good is, I could suggest that among the things that I object to is, the Commonwealth say, if you find the Commonwealth has proven beyond a reasonable doubt that a promissory note or letter of indebtedness, and then it talks about a whole bunch of features and notes and things like that, none of which are the subject of either statutory description or evidence in this case. The statute only says that we find whether or not it's a note or evidence of indebtedness.

So, I think that the appropriate way to put that is, if you find the Commonwealth has proven beyond a reasonable doubt that one of the instruments listed in the statute as a security, and then skip to in their own instruction, which is not ours but just looking at theirs, and that the transaction was [48] represented as having investment characteristics, and then go on to describe what that means.

I agree that you should consider all the facts and circumstances, including the representations of the solicitor and the manner in which the solicitation, which is misspelled, solicitation was made, which is the second paragraph, Your Honor.

THE COURT: Yes.

MR. FLANNERY: And then the last sentence, which is separated . . . well, there's a semicolon, it's two sentences. Further, in order to find an instrument to be a security it is necessary. So I object to the use of the word "not." That the primary purpose of either solicitor or the lender be investment.

Well, the problem with this is, it has to be clear that it's an objective test. It must be clear from the context

of the transaction or the evidence of indebtedness or the note that it was an investment.

An individual saying it's an investment today doesn't make it an investment. That's a subjective [49] test. And that's not what the law is. The test is an objective test.

The jury has to be able to decide that in light of all the circumstances that this was an investment, not that Mrs. Ascher even today says it wasn't an investment or that Bob Ware or somebody else considers it to be an investment.

It has to be clear from the . . .

THE COURT: You've gone past your . . .

MR. FLANNERY: Have I, Your Honor?

THE COURT: Yes.

MR. FLANNERY: And then I would strike that entire last sentence about it only being a consideration of fact or it has to be inadmissible, Your Honor.

THE COURT: All right, sir.

MR. FLANNERY: Thank you, Your Honor.

MR. RUSSELL: Thank you, Your Honor. I guess the first hurdle to cross is, of course, whether the Court thinks this is something to [50] go to the jury. The issue . . .

THE COURT: Well, maybe I can save some time here. I don't think this instruction should be granted as tendered. I think that it's perfectly proper if you can find a suitable definition of a promissory note to tell the jury what a promissory note is.

If you can find a suitable definition of a letter of indebtedness, you can tell the jury what that is. If you can find a suitable definition of investment, we'll tell the jury what that is.

But I think, as I look at the amended indictment, that the only count which makes reference to investment is not really an investment as such, but an investment advisor and agent. That's the only place, I think, in the amended indictment the word "investment" appears.

MR. FLANNERY: Oh, well, the reference to investment is to understanding the definition of whether or not it's a security. It's not enough . . .

THE COURT: Well, the security is described in the instruction that the Court has [51] already granted from the Virginia Code. I'll give this back to you, unless you want to have me mark it refused for the record.

MR. RUSSELL: If you would, Your Honor.

THE COURT: All right, sir.

MR. RUSSELL: The problem is that there is no set definition of what is a promissory note. The Supreme Court of the United States has discussed it and evidence of indebtedness is even less subject to a clear definition.

The primary emphasis, I guess, of this instruction . . . or one of the primary emphasis is exactly the point that Mr. Flannery was trying to make, and we're seeking to avoid, and that is that there can be a number of motivating factors in someone's mind or in the representations that are made to someone in the sale of these instruments. And it is not necessary that the only motivating factor be a desire to make a profit.

THE COURT: Well, isn't that proper argument, Mr. Russell? The Code sections that have been the subject of the amended indictment don't [52] talk about investment at all except in the context that the Court has just stated.

So, do you need to get into that by instruction when it, in the view of the Court is something that . . .

MR. FLANNERY: Your Honor . . .

THE COURT: . . . is properly the subject of argument.

MR. FLANNERY: Your Honor, I think the Commonwealth and the defense may be in agreement to this extent. And that is, just reading a Code section is not enough. We differ certainly as to how much . . .

THE COURT: I'll leave that to the Commonwealth. I'm refusing this instruction.

17?

MR. FLANNERY: There is nothing in the . . . yes, I do object to this, Your Honor, first of all.

THE COURT: All right, I'll hear you.

MR. FLANNERY: In fact, in the context of each investor, it may be necessary for the

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[174] there are exemptions that are applicable and you may consider the following exemptions to determine whether or not, if you find that it's a security . . .

THE COURT: I have that under advisement.

MR. FLANNERY: Yes, Your Honor.

THE COURT: 11?

MR. RUSSELL: The Commonwealth objects to this one, Your Honor. This is Mr. Flannery's version of the instructions which the Court refused by the Commonwealth, but went beyond the mere statutory definition of a security because it commented on the evidence.

Furthermore, we don't think that this is a correct statement of the law and object to it being offered.

THE COURT: Respond to the objection, Mr. Flannery?

THE COURT: Well, Your Honor, I believe it is a correct statement of the law and it's drawn from the statute when

it speaks about context, indeed, parallels the statement about [175] whether or not the note or evidence of indebtedness was an investment that's found in the Commonwealth's own proposed instruction. The demonstration must be made by the Commonwealth to the jury, that in the context that this is an investment.

Now, as I understood the Court's earlier concern about the Commonwealth's proposed instruction of what is the described additional things beyond that standard test. But in both our instructions, that is to say, both the Commonwealth's and the defense instruction, there is a discussion that it must be found to have been an investment in order for the instrument to be considered a security, if you find that there is, within the definition of a security, some instrument there listed.

And so, I think that both the Commonwealth and the defense are in agreement that there is a standard that applies.

I respectfully submit that it's set forth here. As I understood it, they set forth a standard plus more. They were defining what a note or an evidence of indebtedness was and the Court objected to that, as did I.

[176] But I don't object to there being a definition of the standard for a jury to consider as to whether or not if it's a note or evidence of indebtedness that it is a security, if you find that there was an investment.

Further, we discussed whether or not if it incurred as a favor or an accommodation rather than as an investment then it cannot be considered a security. And the citations I list below set forth the risk test for whether or not it's an investment.

And I think the Court will find, if it compares the citations by the Commonwealth and the defense, that we rely on similar authority to reach somewhat different instructions as to what is a security.

THE COURT: This Court believes that the instruction, as it's offered, contradicts the definition set out in the statute. The definition has already been given from 13.1, as one of the instructions considered this morning. I refuse this.

MR. FLANNERY: Well, Your Honor, in offering an alternative instruction, then, [177] not every note . . .

THE COURT: Have you . . .

MR. FLANNERY: Well, I don't have . . . I haven't prepared it, but I think one is required. And that is that not every note, nor is every evidence of indebtedness a security.

Because to reduce that to its absurdity, if an individual lends me money, that's not a security. If two strangers make a loan, that's not a security. If I owe a local shopkeeper something on my bill, he doesn't have to register that as a security.

And that's the reductio out of sermon argument of a position that if it's a note or a security, then by that alone you must register. That's just not the law. It's not the purpose of the securities statute.

That was not the testimony of Mr. Butler, Professor Butler, nor even Professor Dooley. It takes more than having a single note to make an instrument a security.

And whether it's this instruction or a modification of it or a modification of the Commonwealth's there has to be some description

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[3/27/89 **Page 5**] consequences of their acts. The definition of knowingly.

The instruction on concert of action. The accessory instruction. The definition of security. The definition of proffer. The definition of sale or sell. The definition of broker/dealer. The definition of issuer. The definition of a material fact. The definition of transaction. The definition of wilfully. The definition of agent and the requirement that a conspiracy exist in the minds of at least two people.

Now, the Commonwealth has retyped and furnished to the Court on Saturday the finding instruction as to Count 1. Have you had that, Mr. Flannery?

MR. FLANNERY: Yes, I think I do, Your Honor.

THE COURT: Have you any objections other than the ones that you stated on Friday?

MR. FLANNERY: No additional objections, Your Honor.

THE COURT: All right, the [**6**] Court will grant that, noting your objections, sir.

MR. FLANNERY: Your Honor, we were only talking about the finding form, is that correct?

THE COURT: No, I'm referring to the finding instruction that sets out the elements of the offense and the punishment if they find her guilty.

MR. FLANNERY: I don't have a copy of that. I have not been given it.

THE COURT: As to Count 1?

MR. FLANNERY: That's correct. As revised, I don't have a copy of that.

MR. RUSSELL: I thought you were sent a copy.

THE COURT: Maybe you'd like . . . Mr. Cox would you show this to Mr. Flannery so he can see what we're talking about?

BAILIFF: Yes, sir.

MR. FLANNERY: I have the 7th count.

MR. RUSSELL: We sent you 1, 2 and 7.

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[12] dates are not in the finding forms on any of the counts except as to Mary Cathleene Waddell because that's the only duplicate.

There's only one finding instruction for Robert Ware. There's been only one allegation on Robert Ware. I know of nothing that requires every element of the offense to be on the finding form, simply enough to make sure the jury understands which finding form goes with which count.

THE COURT: I think the date's irrelevant insofar as . . . you said Ware?

MR. FLANNERY: Yes, Your Honor.

THE COURT: That need not be in the verdict. It would, however, have to be in the verdict as to Waddell.

MR. RUSSELL: It is, Your Honor.

THE COURT: Objection, sir?

MR. FLANNERY: No, Your Honor.

THE COURT: The Court will grant these without objection.

The Court had several instructions that were [13] taken under advisement. And I've already touched upon my ruling which, in the instruction designated 10 at the bottom of the page, would require that Rochelle Ascher knew the promissory note was a nonexempt security and had to be

registered and so forth. I refuse that, noting the objection of the accused.

Likewise, the Court had taken under advisement the matter of exemption. And the Court, having done the research I think is incidental to the consideration of this instruction, finds that this is not a commercial paper case and that, therefore, the nine months exemption would be inapplicable here.

So I refuse that instruction, which is set out on Pages 12 and 13 as submitted by the accused, noting the objection of defense counsel.

MR. FLANNERY Your Honor, may I make an observation about a different exemption. We've already argued the one . . .

THE COURT: I've already ruled on all but these, Mr. Flannery.

MR. FLANNERY: There's one thing I wanted to point out in light of the Court's

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[23] that, Mr. Flannery?

MR. FLANNERY: I'm sorry, which one is that, Your Honor.

THE COURT: It was one that had the Number 13 on the bottom of the page and was entitled knowledge.

MR. FLANNERY: Oh, knowledge of whether it was a security. I submitted one myself . . .

THE COURT: Yes, that was the one I refused.

MR. FLANNERY: I submitted one over the weekend to the Court.

THE COURT: Okay, we'll come back to that one.

MR. FLANNERY: Okay.

THE COURT: Or I might as well tell you now about that. It wasn't actually knowledge. The question was whether the instrument was a security.

This is the one I found put through my door yesterday afternoon with the federal case by Judge Warner?

[24] MR. FLANNERY: Yes, that's the one, Your Honor.

THE COURT: The Court believes that the factual situation in Warner makes the case inapposite to the one at bar. I refuse that instruction.

In that case it was a question of Judge Warner finding that the so-called securities there were no more than deposits that somebody would have put up, for example, a landlady.

The Court will grant the instruction on knowledge provided, however, that I will white out "knowledge by showing." I think that makes it cumbersome.

So that it will read, "It is not necessary that the Commonwealth prove that the Defendant . . . " and so on.

I don't know if there is any white out here or not. Apparently there's none here.

MR. FLANNERY: Your Honor, there's no authority for this proposition, none. And it runs counter to the notion, not only that one is responsible for ones acts, but it's contradictory to [25] their own Bill of Particulars that said that part of the intent to defraud was that she knowingly and willfully concealed from the purchaser of the security the fact that it was a security.

Their own Bill of Particulars is at odds with their instruction which, itself, is unsupported by any case authority at all. It's certainly not a model instruction. They can't even cite something in the federal law. I don't believe it is the federal law. And they introduced evidence in this courtroom presumably to impute knowledge to her that it was a security.

So we're caught between two . . . between a rock and a hard place. Between an instruction that doesn't appear to be supported in the law that contradicts their Bill of Particulars and evidence they've put in suggesting that she knew about it all along.

Why did they put in the knowledge that it was a security if it was irrelevant? I presume they put it in because it was in their Bill of Particulars and they believed all along they had to prove it.

And I'm sorry it took me so long to raise to [26] my feet, Your Honor, but it took me a while to find this instruction.

That's just not the law. There is no authority. They would have cited authority if they had it. And it contradicts their Bill of Particulars as to what her knowledge was.

And the Bill of Particulars says the failure of the Defendant to register was knowing and wilful. And now I've got an instruction that says she didn't have to know about it.

THE COURT: I've already referred, Mr. Flannery, to the fact that the Bill of Particulars doesn't have anything to do with the evidence and the instructions.

MR. FLANNERY: It has to do with the charge.

THE COURT: I have already ruled with respect to that on Friday, Mr. Flannery.

You have your objection, sir. Thank you.

The Court refuses the Commonwealth's instruction on intent to defraud in the context of a securities law, noting the objection of the Commonwealth.

* * * *

[39] offered not for the truth because I think it's important

to talk about it, because I think it's the hallmark of their case.

Your Honor, I also think . . .

THE COURT: Just a minute, Mr. Flannery.

MR. FLANNERY: Yes, Your Honor.

THE COURT: Instruction Number 1 will be the fact of the arrest being not evidence. Number 2 is the fact of the indictment being not evidence. Number 3 will be the presumption of innocence. Number 4 is stricken evidence. Number 5 is the role of the jury as the trier of fact. Number 6 is prior inconsistent testimony. Number 7 is the circumstantial evidence instruction. Number 8 is the inference that every person intends and so forth. Number 9 is the Count 1 finding instruction. Number 10 is Count 2. Number 11 is Count 4. Number 12 is Count 7. 13 is Count 8. 14 is Count 9. 15 is Count 10. 16 is Count 11. 17 is the definition of a security. 18 is the instruction referring to it being unlawful to sell a security from or into

* * * *

[3/28/89 **Page 90**] the note as a security. That's the way they define it to you.

These are political loans, high risk loans. And we'll discuss the fact that it's your determination to make, reading the charge, whether or not these are securities in light of the charge.

Your Honor, when . . .

MR. CHABALEWSKI: Excuse me, counsel, I think I need to object to counsel's argument.

THE COURT: Meet at the bench, gentlemen.

BENCH CONFERENCE

MR. CHABALEWSKI: Your Honor, the determinate factor is it a note or is it evidence of indebtedness. Now . . .

THE COURT: It is what?

MR. CHABALEWSKI: Is it a note or is it evidence of indebtedness? It is not up to the jury to determine whether a political notes are any less or any more securities, merely is it a note. If it is a note, it is a security.

And to allow our counsel to argue to the jury that they have the choice is improper. It is not the law. And [**91**] there is no exception that raises itself, in this case at least, that the Defendant has brought evidence to the Court to justify that argument. And I think, at this juncture, it's important enough to have to object so that the jury is not misled by that argument.

THE COURT: Mr. Flannery?

MR. FLANNERY: Well, Your Honor, there are two parts to this. One is that we're reviewing the evidence that the Commonwealth itself brought out in its case. That's number one.

Number two, a political loan in the nature of a gift in deciding whether or not . . .

THE COURT: If it's a gift, it's not a loan.

MR. FLANNERY: That's right. And I . . .

THE COURT: And if it's a loan, it's not a gift.

MR. FLANNERY: That's right. And that's a question they have to decide. And the Commonwealth and I both said you have to read the charge and decide whether or not this fits into that. And I have carefully separated my remarks about the evidence from my [92] remarks about the instruction and told them it's your decision, in light of the instruction, to decide whether or not these are securities. Now, that's my . . .

THE COURT: Thank you.

MR. FLANNERY: Yes, Your Honor.

IN OPEN COURT

MR. FLANNERY: Now, you may recall . . .

THE COURT: Just a moment.

MR. FLANNERY: I'm sorry, Your Honor.

THE COURT: Members of the jury, the pertinence of a loan is irrelevant, whether it's a loan of a bank or a loan from a particular political party. Instruction Number 17 defines the term "security", you'll be bound by that.

You may proceed, Mr. Flannery.

MR. FLANNERY: Thank you, Your Honor.

And if in the light of that instruction, when you review it, you decide that what is called a loan is, in fact, a political gift and that the person knew well that the risk was so great that it was equivalent to holding onto it ever [93] so tentatively, realizing full well that the risk was so great that they'd never see the money again and that it

was, in essence, a gift, then you may decide that this is not a "security". You may decide that this is a political gift called a loan. And that is a determination that you make and that the Commonwealth cannot come here and say by the fact that it says promissory note or it says letter of indebtedness that makes it one. No. Otherwise, you have no purpose in this Court.

MR. CHABALEWSKI: Your Honor, I . . .

MR. FLANNERY: It's up . . .

MR. CHABALEWSKI: Excuse me, counsel. Again, I'm going to object to that argument, Your Honor. I think . . .

THE COURT: The Court sustains the objection. The jury will disregard it. The Court has told you in the instruction I just mentioned what a security is.

MR. FLANNERY: And if you consider the monies that these people gave gifts . . . gifts, then you may not find that these are securities.

You may recall that Hintz testified that when he

Virginia Supreme Court Decision & Order (denying Petition for Rehearing), dated April 17, 1992

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 17th day of April, 1992.

Rochelle Joyce Ascher,

Appellant,

against

Commonwealth of Virginia,

Appellee.

Record No. 911744
Court of Appeals No. 1011-89-4

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 11th day of March, 1992 and grant a rehearing thereof, the prayer of said petition is denied.

A Copy,
Teste:

David B. Beach
Clerk

Virginia Court of Appeals Decision & Order (denying Petition for Rehearing), dated October 17, 1991

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 17th day of October, 1991.

Rochelle Joyce Ascher,

Appellant,

against

Commonwealth of Virginia,

Appellee.

Record No. 1101-89-4
Circuit Court Nos. 5362 and 5977

Upon a Petition for Rehearing En Banc
Before the Full Court

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 13th day of August, 1991 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing en banc in this case. Code § 17-116.02(D).

A Copy,

Teste:

Patricia G. Davis, Clerk

By: Cynthia L. McCoy
Deputy Clerk

INDICTMENT:

Conspiracy Count, as amended

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

The Grand Jury charges that:

In the County of Loudoun and elsewhere:

ROCHELLE ASCHER

FIRST COUNT: between the 1st day of April, 1983, and the 30th day of March, 1987, ROCHELLE ASCHER did feloniously conspire within and without the Commonwealth of Virginia, with Michael Billington, Barbara Boyd, George Canning, Richard Freeman, Anita Gallagher, Paul Gallagher, Fred Haight, Larry Hecht, Linda de Hoyos, Keith Levitt, Donald Phau, Martha Quinde, Stuart Rosenblatt, David Shavin, Ed Spannaus, Richard Welsh, Kathy Wolfe, and others to commit within and without the Commonwealth of Virginia a felony, to wit, the unlawful offer and sale of a security with the intent to defraud the purchaser, in violation of §§ 13.1-502(1), (2) and (3), and § 13.1-520A and § 18.2-22 of the Code of Virginia;

A TRUE BILL: _____ Foreman.

ON THE EVIDENCE OF: Special Agent Charles D. Bryant
Virginia State Police

INDICTMENT:

Substantive Securities Counts One Through Eleven (1-11), as amended

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY
AMENDED INDICTMENT

The grand jury charges that:

In the County of Loudoun and elsewhere,

ROCHELLE ASCHER

FIRST COUNT: between the lst day of July, 1984 and the 30th day of September, 1986, did knowingly and willfully offer and sell an unregistered security, to wit: promissory notes issued in the name of Campaigner Publications, Inc., Caucus Distributors, Inc., Executive Intelligence Review, Fusion Energy Foundation and Publication and General Management, Inc., with the intent to defraud the purchaser, in violation of § 13.1-507 and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

SECOND COUNT: between the lst day of July, 1984 and the 30th day of September, 1986, ROCHELLE ASCHER did knowingly and willfully transact business as an unregistered broker-dealer, investment advisor and agent, with an intent to defraud the purchaser of a security, in violation of § 13.1-504 and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

THIRD COUNT: on or about the 15th day of March, 1984, ROCHELLE ASCHER, knowingly and willfully and with the intent to defraud, directly or indirectly did (1) employ a device, scheme or artifice to defraud, and (2) obtained money or property by means of an untrue statement of a

material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and, (3) did engage in a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser, and that she performed the above in the offer and sale of a security to John Marymont, to wit: a promissory note issued in the name of Fusion Energy Foundation, in violation of §§ 13.1-502(1), (2) and (3) and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

FOURTH COUNT: on or about the 29th day of June, 1984, ROCHELLE ASCHER, knowingly and willfully and with the intent to defraud, directly or indirectly did (1) employ a device, scheme or artifice to defraud, and (2) obtained money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and, (3) did engage in a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser, and that she performed the above in the offer and sale of a security to Robert N. Ware, to wit: a promissory note issued in the name of Fusion Energy Foundation, in violation of §§ 13.1-502(1), (2) and (3) and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

FIFTH COUNT: on or about the 10th day of August, 1984, ROCHELLE ASCHER, knowingly and willfully and with the intent to defraud, directly or indirectly did (1) employ a device, scheme or artifice to defraud, and (2) obtained money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and, (3) did engage in a transaction, practice,

or course of business which operates or would operate as a fraud or deceit upon the purchaser, and that she performed the above in the offer and sale of a security to Welton H. Bryant, to wit: a promissory note issued in the name of Campaigner Publications, Inc., in violation of §§ 13.1-502(1), (2) and (3) and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

SIXTH COUNT: on or about the 17th day of September, 1984, ROCHELLE ASCHER, knowingly and willfully and with the intent to defraud, directly or indirectly did (1) employ a device, scheme or artifice to defraud, and (2) obtained money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and, (3) did engage in a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser, and that she performed the above in the offer and sale of a security to Curtis W. Bolton, to wit: a promissory note issued in the name of Campaigner Publications, Inc., in violation of §§ 13.1-502(1), (2) and (3) and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

SEVENTH COUNT: on or about the 6th day of August, 1986, ROCHELLE ASCHER, knowingly and willfully and with the intent to defraud, directly or indirectly did (1) employ a device, scheme or artifice to defraud, and (2) obtained money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and, (3) did engage in a transaction, practice, or course of business which operates or would operate as a fraud, or deceit upon the purchaser, and that she

performed the above in the offer and sale of a security to M. Cathleene Waddell, to wit: a promissory note issued in the name of Executive Intelligence Review, in violation of §§ 13.1-502(1), (2) and (3) and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

EIGHTH COUNT: on or about the 3rd day of September, 1986, ROCHELLE ASCHER, knowingly and willfully and with the intent to defraud, directly or indirectly did (1) employ a device, scheme or artifice to defraud, and (2) obtained money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and, (3) did engage in a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser, and that she performed the above in the offer and sale of a security to M. Cathleene Waddell, to wit: a promissory note issued in the name of Caucus Distributors, Inc., in violation of §§ 13.1-502(1), (2) and (3) and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

NINTH COUNT: on or about the 22nd day of September, 1986, ROCHELLE ASCHER, knowingly and willfully and with the intent to defraud, directly or indirectly did (1) employ a device, scheme or artifice to defraud, and (2) obtained money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and, (3) did engage in a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser, and that she performed the above in the offer and sale of a security to M. Cathleene Waddell, to wit: a promissory note issued

in the name of Caucus Distributors, Inc., in violation of §§ 13.1-502(1), (2) and (3) and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

TENTH COUNT: between the 5th day of September, 1986, and the 19th day of September, 1986, ROCHELLE ASCHER, knowingly and willfully and with the intent to defraud, directly or indirectly did (1) employ a device, scheme or artifice to defraud, and (2) obtained money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and, (3) did engage in a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser, and that she performed the above in the offer and sale of a security to Larry Parker, a/k/a Larry Burchette, to wit: a promissory note issued in the name of Caucus Distributors, Inc., in violation of §§ 13.1-502(1), (2) and (3) and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

ELEVENTH COUNT: between the 7th day of March, 1984, and the 16th day of February, 1986, ROCHELLE ASCHER, knowingly and willfully and with the intent to defraud, directly or indirectly did (1) employ a device, scheme or artifice to defraud, and (2) obtained money or property by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and, (3) did engage in a transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser, and that she performed the above in the offer and sale of a security to Edward Allen, to wit: a promissory note issued in the name of Campaigner Pub-

lications, Inc., in violation of §§ 13.1-502(1), (2) and (3) and § 13.1-520A of the Code of Virginia;

A TRUE BILL: _____ Foreman

ON THE EVIDENCE OF: Special Agent Charles D. Bryant
Virginia State Police

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF LOUDOUN

Criminal No. 5362

Commonwealth of Virginia

v.

Rochelle Joyce Ascher

ANSWER TO DEFENDANT'S MOTION FOR A BILL OF PARTICULARS

Come now the Commonwealth of Virginia by the Attorney General of Virginia and by the Commonwealth's Attorney for the County of Loudoun, Virginia, and in response to the defendant's Motion for a Bill of Particulars, states as follows:

1. On March 26, 1987, a computer list was furnished to the defendant which identified the name of each person to whom the defendant fraudulently solicited and sold promissory notes on behalf of Caucus Distributors, Incorporated (hereinafter "CDI"), Fusion Energy Foundation (hereinafter "FEF"), Campaigner Publications, Incorporated (hereinafter "CPI"), EIR News Service, Incorporated (hereinafter "EIR"), and Publications & General Management, Incorporated ("PGM"). This list also provided the date the note was sold, the amount of the note, the company that issued the note, and the interest rate promised. A duplicate of this list is attached to this Answer and filed with the Court and represents the transactions which are the subjects of counts one and two of the indictment.

2. As evidence of the fraud alleged in counts one and two of the indictment, the Commonwealth intends to show that:

(a) the defendant never registered with the Commonwealth as an agent of the FEF, CPI, EIR, CDI, and PGM, and therefore, was never issued a license to offer and sell securities and that her failure to register was in violation of § 13.1-504 and § 13.1-520(A);

(b) that promissory notes sold by the defendant were not registered in compliance with § 13.1-507 and § 13.1-520(A);

(c) that the failure of the defendant to register was knowing and willful in that the defendant was required to register and her failure to do so was an effort to avoid scrutiny and detection by the State Corporation Commission or law enforcement authorities in Virginia and other jurisdictions; and

(d) that the failure to register either the notes or the agents selling the notes was part of an overall scheme to defraud the purchasers of those notes through the willful and deliberate failure to repay the financial obligations evidenced by the notes.

3. As evidence of fraud as to counts three through eleven, the Commonwealth will prove that the defendant made material misstatements and misrepresentations to those individuals named in each respective count of the indictment of the following nature:

(a) that the investment made would be used to print and publish articles, books, or papers relating to subjects such as weapons, AIDS, drugs, or the Soviet Union;

(b) that loans to any organization represented by the defendant was a good investment and a good place to put money;

(c) that the organizations represented by the defendant did not take any loans which it could pay back;

(d) that the investment would support causes with which one, some, or all of the victims were sympathetic; and

(e) that the organizations represented by the defendant had the financial capacity to repay the loans.

The Commonwealth will further prove that the defendant exerted undue pressure on those individuals named in each respective count of the indictment through the following means:

(a) the number, frequency, and length of telephone calls to each victim during the course of which the defendant used intimidation, harassment, and scare tactics to induce and compel the victim to purchase a promissory note;

(b) by making accusations in reference to the victim's character if he or she was unwilling to purchase additional notes; and

(c) by continuously stressing the absolutely urgent necessity of having funds immediately to respond to a crisis.

The Commonwealth will further prove that the defendant failed to disclose to those individuals named in each respective count of the indictment material facts of the following nature:

(a) that the money obtained from the victim would be put in to a labyrinth of financial accounts, commingled with funds from many other undisclosed entities and organizations, and used to purchase a variety of undisclosed goods and services;

(b) that the primary source of income available to the organizations represented by the defendant to repay principal and interest on the notes was from the sale of other notes to other similarly situated investors;

(c) that CDI, FEF, CPI, EIR, and PGM were in default on their obligations to repay principal and interest to other investors and one or more judgments had been entered against CDI for failure to repay principal and interest when due;

(d) that the defendant was not licensed to sell securities in the Commonwealth of Virginia and the promissory notes issued were not registered with the State Corporation Commission of Virginia as required by law;

(e) that CDI, CPI, and FEF, and other affiliated agents and organizations had been formally restrained by one or more states from the continued solicitation and sale of the same type of promissory notes which the defendant was then in the process of selling;

(f) that virtually none of the notes previously sold to other investors by the organizations represented by the defendant were being paid back according to the terms of the notes;

(g) that the organizations represented by the defendant were regularly budgeting a small percentage of their issued notes for the payment of any interest or the repayment of principal and would generally only make these payments or repayments to investors who had threatened to take legal action or to discontinue purchasing additional notes;

(h) that Lyndon H. LaRouche, Jr., refused to accept any degree of responsibility for the sale of promissory notes by any agent of any organization affiliated with him, and further that Lyndon H. LaRouche, Jr., refused to accept any degree for responsibility for the financial obligations of those organizations;

(i) financial information, financial reports, and/or financial statements with regard to the assets, liabilities, income, and expenditures of the organizations represented by the defendant, information concerning the litigation and history of the organizations represented by the defendant, inclusive of lawsuits filed by or against either the defendant or the organization or both, judgments entered for or against either the defendant or the organization or both, and any contingent liabilities of organizations represented by the defendant that may have existed;

(j) the implication of the term "unsecured" and the serious financial risk associated with an "unsecured" promissory note as opposed to other forms of investments, and

(k) the nature and type of information required to be disclosed in compliance with § 13.1-510.

4. The Commonwealth will also prove that the defendant was a knowing and willful participant in an overall scheme to defraud investors such as those individuals named in each respective count of the indictment, and as such, was responsible for the acts and statements of the other participants in this scheme to defraud, including, but not limited to, the acts and statements of Keith Levit, Fred Haight, David Shavin, Richard Freeman, Martha Quinde, Richard Welsh, and George Canning.

Respectfully Submitted,

By: John B. Russell, Jr.
Counsel

Mary Sue Terry
Attorney General of Virginia

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JURY INSTRUCTIONS

Defendant's Proposed Jury Instructions *re* Virginia Security Code

INSTRUCTION NO. _____

THE COURT INSTRUCTS THE JURY THAT:

Mrs. Rochelle Ascher is charged in Count One with the crime of knowingly and wilfully offering for sale and selling an unregistered security with the intent to defraud the purchaser between July 1, 1984 and September 30, 1986. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

First: That a promissory note issued in the name of Campaigner Publications, Inc., Caucus Distributors, Inc., Executive Intelligence Review, Fusion Energy Foundation, and Publication and General Management, Inc. between July 1, 1984 and September 30, 1986 to an individual in Loudoun County;

Second: That the promissory note was in fact a security as defined in another instruction of the Court;

Third: That said security was not exempt from registration and it was required that said security be registered with the State Corporation Commission, and that said security was not registered;

Fourth: That Rochelle Ascher knew that the promissory note was a non-exempt security that had to be registered and did knowingly and wilfully offer and sell said unregistered security;

Fifth: That Rochelle Ascher did offer and sell such unregistered security to someone in Loudoun County; and

Sixth: That Rochelle Ascher did knowingly and wilfully act with the intent to defraud the purchaser as described in another instruction.

Va. Code §§ 13.1-507, 13.1-520.

INSTRUCTION NO. _____

THE COURT INSTRUCTS THE JURY THAT:

Alleged false representations which are promises or statements of intention referring to future events are not grounds for a conviction, even though such representations caused an individual to part with his or her money or property. Only if the representations are knowingly false as to past events or existing facts may you find the accused guilty provided that the Commonwealth has proven beyond a reasonable doubt the other elements of this crime.

VA Code § 13.1-520; modeled on Virginia Model Jury Instructions—Criminal, Instruction No. 28.300, 1987 Supplement to 1985 Replacement Edition (Instruction on "Definition-Promises or Statements of Intention); *One-O-One Enterprises, Inc. v. Caruso*, 668 F. Supp. 693 (D.D.C. 1987); *High v. McLean Financial Corp.*, 659 F. Supp. 1561 (D.D.C. 1987); *Urban Investments, Inc. v. Branham*, 464 A.2d 93 (D.C. App. 1983); *see also Greyhound Lines, Inc. v. Bender*, 595 F. Supp. 1209 (D.D.C. 1984).

INSTRUCTION NO. _____

THE COURT INSTRUCTS THE JURY THAT:

The term "security" means "any note" or "evidence of indebtedness." But not every note or evidence of debt is a security. Whether or not a note or evidence of indebtedness is a security depends on the context. If you find beyond a reasonable doubt that the context is such that the note or evidence of indebtedness is a financial investment, then you may find the instrument is a security. If you find, however, that the context is such that the note was made or the evidence of indebtedness incurred as a favor or an accommodation, rather than as an investment, then the instrument, whether it is a note or evidence of indebtedness, is not a security.

If you have a reasonable doubt as to whether the instrument in question is a security, you shall resolve that doubt in favor of the Defendant.

Va. Code § 13.1-501(j); *Marine Bank v. Weaver*, 455 U.S. 551 (1982); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975); *S.E.C. v. W.J. Howey Company*, 328 U.S. 293 (1946); and *Amfac Mortgage Corp. v. Arizona Mall, Inc.*, 583 F.2d 426 (9th Cir. 1978).

Defendant's "Memorandum of Law: The Definition of a Security" (and attached proposed jury instruction), dated March 26, 1989

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

Criminal Nos: No. 5977, 5362

COMMONWEALTH OF VIRGINIA
vs.
ROCHELLE JOYCE ASCHER

MEMORANDUM OF LAW:
The Definition of a Security

This memorandum is submitted in support of Mrs. Ascher's request for an instruction as to what constitutes a security. This request is necessary because the statutory definition is not sufficient by itself as a matter of law.

It is true the Securities Code does include a definition of security. But what the issuer calls the instrument is not determinative of what the instrument is. Compare *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed. 2d 621 (1975)(shares denominated as stock did not make them securities when they did not have traditional characteristics that stocks ordinarily possess).

More than that, not every note or evidence of indebtedness that falls within the literal definition of security is a "security."

In fact, there has been at least one case considering whether a note is a security under the Virginia Securities Code and, in that case, the federal district court concluded

that the "note" in question, described as such, although literally embraced by the statutory definition of security, was not a security. In *Principe v. McDonald's Corp.*, 463 F. Supp. 1149 (E.D. VA. 1979), the Court held that the "note" in question was not a security "under either State (Virginia) or federal law." A copy of that case is attached for the Court's convenience.

Throughout the struggle for an appropriate definition of a security, the Courts have been mindful of the fact that the bottom line question is whether the particular investment or instrument involved is one that needs or demands the protection of the federal or state securities laws. See *Marine Bank v. Weaver*, 455 U.S. 551, 102 S.Ct. 1220, 71 L.Ed. 2d 409 (1982)(bank-issued certificate of deposit not a security subject to federal securities laws since it is already federally insured and purchasers therefore do not need that extra layer of protection the laws afford).

When the Supreme Court first considered the question, its focus was the general character of the investment vehicle in question. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S.Ct. 120, 88 L.Ed. 88 (1943). Soon afterwards, the Supreme Court crafted a definition of what constituted an investment, defining an investment as "a contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely from the efforts of the promotor or a third party." *SEC v. W. J. Howey*, 328 U.S. 293, 298-99, 66 S.Ct. 1100, 1102-03, 90 L.Ed. -244 (1946). A copy of that case has also been enclosed for the Court's convenience.

WHEREFORE, based on the authorities cited herein, Defendant Ascher respectfully requests that this Honorable Court instruct the jury in accordance with the attached proposed instruction.

Respectfully Submitted,

ROCHELLE JOYCE ASCHER

By her attorney

JOHN P. FLANNERY, II

Dated: March 26, 1989

[Certificate of Service omitted in this printing]

INSTRUCTION NO. _____

Defendant's Proposed Jury Instruction *re* Virginia Security Code

If the Commonwealth proves beyond a reasonable doubt that the instrument at issue is included within the formal definition of security, then you must find beyond a reasonable doubt that the instrument in question is an "investment" before you may find that it is a "security."

An "investment" is a contract, transaction or scheme whereby a person (1) invests his money (2) in a common enterprise and (3) is led to expect profits (4) solely from the efforts of the promoter or a third party.

If you have a reasonable doubt as to whether the instrument in question is a security, you shall resolve that doubt in favor of the Defendant.

Instruction No. _____
Notes and Evidence of Indebtedness as Securities

If you find that the Commonwealth has proven beyond a reasonable doubt that a promissory note or letter of indebtedness relating to the transactions set forth in the counts of the indictments in this case had the usual features of a note or other evidence of indebtedness (such as a principal amount, rate of interest, and maturity or payment date), and that that transaction was represented as having investment characteristics, you shall find that the promissory note or letter of indebtedness was a security within the meaning of the Virginia Securities Act.

In making this determination you should examine the substance of the transaction, placing an emphasis on the economic realities. You should consider all the facts and circumstances surrounding the making of any loan, including the representations of the solicitor and the manner in which the solicitation was made. Further, in order to find an instrument to be a security, it is not necessary that the primary purpose of either the solicitor or the lender be investment; rather it is only necessary that investment was a consideration or factor in the offer or sale of the note or other evidence of indebtedness.

Landreth Timber Co. v. Landreth, 471 U.S. 681, 692-94 (1985); *Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S.Ct. 1220, 1223, 71 L.Ed.2d 409 (1982); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 848-51, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975); *S.E.C. v. C.M. Joiner Corp.*, 320 U.S. 344, 348-53, 64 S.Ct. 120, 88 L.Ed. 88 (1943); *Tcherepnin v. Knight*, 389 U.S. 332, 19 L.Ed.2d 564 (1967); *Ruefenacht v. O'Halloran*, 737 F.2d 320 (3rd Cir. 1984).

FINAL JURY INSTRUCTIONS

Jury Instructions: Nos. 8, 9, 10, 11, 17, 25, 26, 27, 28, 29, 31, 32, 33, 34, and 35 (approved by trial court and given to the jury)

Instruction No. 8

Inference of Intention

You may infer that every person intends the natural and probable consequences of her acts.

Virginia Model Jury Instructions—Criminal, Instruction No. 2.600, 1985 Replacement Edition [verbatim except changing "his" to "her"].

Instruction No. 9

In Count 1 (One) defendant is charged with the offense of offering or selling an unregistered security with the intent to defraud the purchaser. It is charged that between July 1, 1984 and September 30, 1986 defendant offered or sold promissory notes of Campaigner Publications, Inc., Caucus Distributors, Inc., Executive Intelligence Review, Fusion Energy Foundation, and Publication and General Management, Inc.

In order for you to find the defendant guilty of this offense, the Commonwealth must prove beyond a reasonable doubt

(1) that between July 1, 1984 and September 30, 1986 the defendant knowingly and willfully offered for sale or sold a promissory note of either Campaigner Publications, Inc., or Caucus Distributors, Inc., or Executive Intelligence Review, or Fusion Energy Foundation, or Publication & General Management, Inc., or acted as an accessory before the fact in such offer or sale;

(2) which was an unregistered security;

(3) with the intent to defraud the purchaser thereof; and

(4) that any of the activity in this offense which is described above took place in whole or in part in Loudoun County, Virginia.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense charged in this Count, you shall find the defendant guilty and fix her punishment at a specific term of imprisonment, but not less than two years nor more than ten years.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements, but you are not satisfied beyond a reasonable

doubt that the defendant intended to defraud the purchaser, you shall find the defendant guilty and fix her punishment as a fine of not less than $100 nor more than $5000 and/or confinement in jail for not less than 30 days nor more than one year.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt one or more of the elements of the offense charged in addition to intent to defraud the purchaser, then you shall find the defendant not guilty of the offense charged in this count.

Instruction No. 10

The defendant is charged in Count 2 with the offense of transacting business as an unregistered securities broker-dealer or agent with the intent to defraud the purchaser of the security between July 1, 1984 and September 30, 1986. In order for you to find the defendant guilty of this offense, the Commonwealth must prove beyond a reasonable doubt that the defendant

(1) knowingly and willfully transacted business as an unregistered securities broker-dealer or agent;

(2) by offering for sale or selling a security or by acting as an accessory before the fact in such offer or sale;

(3) with the intent to defraud the purchaser; and

(4) that any of the activity in this offense which is described above took place in whole or in part in Loudoun County, Virginia.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense charged in this Count, you shall find the defendant guilty and fix her punishment at a specific term of imprisonment, but not less than two years nor more than ten years.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements, but you are not satisfied beyond a reasonable doubt that the defendant intended to defraud the purchaser, you shall find the defendant guilty and fix her punishment at a fine of not less than $100 nor more than $5000 and/or confinement in jail for not less than 30 days nor more than one year.If you find that the Commonwealth has failed to prove beyond a reasonable doubt one or more of the elements of the offense charged in addition to intent to defraud the purchaser, then you shall find the defendant not guilty of the offense charged in this count.

Instruction No. 11

Defendant is charged in the Fourth Count with the offense of the unlawful offer and sale of a security with the intent to defraud the purchaser. In order to find the defendant guilty of this offense you must find the Commonwealth has proven beyond a reasonable doubt:

(1) that on or about June 29th, 1984 defendant knowingly and willfully offered for sale or sold a promissory note in the name of Fusion Energy Foundation to Robert N. Ware with the intent to defraud the purchaser,

(2) that this promissory note was a security,

(3) that in making the offer or sale, defendant directly or indirectly either

(a) employed a device, scheme or artifice to defraud, or

(b) obtained money or property of Robert N. Ware by means of an untrue statement of a material fact or an omission to state a material fact that was necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) engaged in a transaction, practice or course of business which operated or would operate as a fraud or deceit upon Robert N. Ware.

(4) that any of the activity in this offense which is described above took place in whole or in part in Loudoun County, Virginia.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense charged in this Count, you shall find the defendant guilty and fix her punishment at a specific term of imprisonment, but not less than two years nor more than ten years.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements, but you are not satisfied beyond a reasonable doubt that the defendant intended to defraud the purchaser, you shall find the defendant guilty and fix her punishment at a fine of not less than $100 nor more than $5000 and/or confinement in jail for not less than 30 days nor more than one year.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt one or more of the elements of the offense charged in addition to intent to defraud the purchaser, then you shall find the defendant not guilty of the offense charged in this count.

Instruction No 17

The term "security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate of subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Instruction No. 25

Transaction, Practice or Course of Business

A "transaction, practice or course of business which operates or would operate as a fraud or deceit" means a plan to procure money or property or to induce another to act by means of false representations or failing to reveal material facts.

Instruction No. 26

Knowingly

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

Instruction No. 27

"Agent" means any individual who as a director, officer, partner, associate, employee or sales representative of a broker-dealer or issuer effects or undertakes to effect the sales of securities.

Instruction No. 28

Willfully

An act is done willfully if it is done deliberately and knowingly, and not because of mistake, accident, negligence or other innocent conduct.

Instruction No. 29

Knowledge

It is not necessary that the Commonwealth prove knowledge by showing that the defendant knew that what she was offering for sale or selling was a security.

Instruction No. 31

Accessory Before Fact

An accessory before the fact is one who was not present at the time of the commission of the crime, but who, before the commission of the crime, in some way planned, advised or assisted in the commission of the crime knowing or having reason to know of the intent of the principal to commit the crime.

An accessory before the fact is liable for the same punishment as the person who actually committed the crime. The Commonwealth must prove beyond a reasonable doubt that the defendant is an accessory before the fact.

If you find the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

Instruction No. 32

Count 12: Conspiracy Indictment

Defendant has been charged with the crime of conspiracy to offer or sell a security with the intent to defraud the purchaser.

The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) that the defendant entered into an agreement with one or more other persons; and

(2) that the agreement between the defendant and at least one other person was that they were to unlawfully offer or sell a security with the intent to defraud the purchaser of such security; and

(3) that such agreement continued during some period between August 18, 1985 and March 30, 1987; and

(4) that the agreement was made, in whole or in part, or an act in furtherance of this agreement took place in whole or in part in Loudoun County, Virginia.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the elements of the offense as charged, then you shall find the defendant guilty and fix her punishment at a specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or confinement in jail for a specific time of not more than twelve (12) months and/or a fine of a specific amount, but not more than $1000.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense,then you shall find the defendant not guilty.

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Instruction No. 33

Conspiracy-Acts in Furtherance

If you find that the Commonwealth has established beyond a reasonable doubt that the defendant was a member of a conspiracy, she is responsible for the acts of other members of that conspiracy which are committed in furtherance of the conspiracy, even if such acts are committed without her direct knowledge.

Instruction No. 34

Conspiracy: Two Person Requirement

A conspiracy cannot exist unless criminal intent is shared by the minds of at least two people.

Instruction No. 35

Concert of Action

If there is concert of action with the resulting crime one of its incidental probable consequences [then whether such crime was originally contemplated or not] all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime.

TRIAL TESTIMONY TRANSCRIPT EXCERPTS RELATING TO SECURITIES

L.W. Burchett, Direct
2/2/89

* * * *

[81] of your name, Larry David Parker?

A. I went to Washington National Airport where I was approached by an individual who was manning a booth or a table over to one side of the airport.

After being approached by this individual, I noticed on the front of the booth there was a sign that said, Crack Test for Congress. Some literature was pointed out to me on this table, including a magazine with the name of *Fusion*, a magazine with the name of *Executive Intelligence Review*, or EIR I think were the initials that were used on it, and a book called *Dope, Incorporated*.

After some discussion with the individual that approached me, I took a subscription to these magazines and purchased one of the books called *Dope, Incorporated* for a total of $75.

I provided this individual with a credit card, a Visa card in the name of Larry David Parker to pay this $75 and I was given a form and requested to fill out information that included my name, address, telephone number and my occupation.

And I used, again, the name of Larry David Parker, the telephone number for this specific investigation and I used my occupation as in real estate.

* * * *

[94] THE COURT: The Court will permit the question as to the scope of the conversation, not what was said.

I sustain the objection in that regard.

MR. RUSSELL: Thank you, Your Honor.

Q. The question, Agent Burchett is, without specific reference to what was said, what topics were discussed during the initial portion of your conversation?

MR. FLANNERY: Objection, Your Honor.

THE COURT: I've already ruled, Mr. Flannery, have a seat, sir.

MR. FLANNERY: I'm not saying there's not a way to do this, Your Honor. This is just not the way to do it.

THE COURT: I've ruled on that point, sir.

Q. Do you recall the question?

A. I'm sorry, would you repeat it again, sir.

Q. Without going into the specifics of what was said, would you indicate for the jury the subject matter, the topics that were discussed in the initial portion of [95] this conversation?

A. Yes, sir. There were a number of topics discussed. The main portion of those were dealing with various political points of view, including the control of AIDS, the collapse of the American banking system, a large conspiracy involving a trilateral commission that was controlling the American banking system.

MR. FLANNERY: Objection, Your Honor. This is substance . . .

THE COURT: I've already ruled, Mr. Flannery. Would you have a seat, sir.

MR. FLANNERY: Yes, Your Honor.

Q. You may continue.

A. The spread of AIDS and a coverup by the Disease Control people in Atlanta. And then the conversation went

into subscriptions to magazines, monthly reports, the request for monies through contributions, subscriptions, gifts.

THE COURT: Now, this was not a general topic of conversation, Mr. Burchett; this was something that whoever was on the other end of the phone was saying?

* * * *

Burchett/Ascher Tape Transcript
2/3/89
* * * *

[31] ASCHER: In the case of Venezuela, we did much better, I mean Peru, a much better victory because we were sued by the former prime minister of the country . . .

BURCHETT: Um hum.

ASCHER: . . . whose name is Manuel Ullou. Not only did we win the suit, and it was a hundred million dollar law suit, which in Peru in U.S. dollars is a lot of money.

BURCHETT: Um hum.

ASCHER: We won the suit. He is now under indictment for narcotics trafficking. This would be the equivalent you know of having Donald Regan or Jimmy Carter behind bars.

BURCHETT: Um hum.

ASCHER: For narcotics trafficking. When we took loans for Dope, Inc., it was for two reasons. One was because, you know, the banks are not very happy with this book. Ah, the book came as a result of work we did in the state of New York with the New York Banking Commissioner against a number of foreign banks coming in and buying up, you know, Marine Midland and so forth.

BURCHETT: Um hum.

ASCHER: The other thing is that if we've got to pay interest to anybody, we'd far rather pay it to our supporters. And it's worked out beautifully for 15 years since what we do is, otherwise when a book came out we would be able to put it out in ten or twenty or thirty thousand copies.

BURCHETT: Um hum.

ASCHER: People giving us larger loans makes one thing possible. It means we can put something out in a quarter of a million copies and have a bigger impact which, that's what we're interested in.

BURCHETT: Um hum.

ASCHER: We're interested in changing the country. I mean this book, and I, there's certain, things I won't go into over the phone because it's (unintelligible) but you should know that the operation that Reagan ran on the [32] ground in Bolivia, this last (unintelligible) operation,

BURCHETT: Um hum.

ASCHER: And the operation that was run on the ground in Guatemala word for word for word for word down to you know which planes to use and how to run the operation, politically had to do with came directly from us.

BURCHETT: Uh huh.

ASCHER: And Reagan is, here is a breakthrough being made which is that Reagan does see this question and both the AIDS and the drug question as National Security questions. I mean that's what

BURCHETT: Yeah, he's addressed that.

ASCHER: (unintelligible) Critical. But this is the break. Everybody can talk about it, you know, drugs how terrible they are, instead of what, the breakthrough with this book is it's the first time that anybody has, and this is certain people within the Reagan administration are looking at this thing as low intensity warfare. That's what's critical. Because if you don't understand you're at war, nothing else makes any difference. And that's the key thing.

BURCHETT: Yeah.

ASCHER: So,

BURCHETT: Well let me,

ASCHER: So I can give you back to Fred

BURCHETT: Well, let me ask you one question before you go, I'm sorry, I forgot your name, what is it?

ASCHER: Rochelle.

BURCHETT: Rochelle?

ASCHER: R-0-C-H-E-L-L-E. Right.

BURCHETT: Oh, Rochelle, okay. Ah, on the loan type of thing, and I don't know if I'd be interested in something like that or not, but just in case, you know if I could come up as opposed to a, you know, contribution which is gone forever, ah,

[33] ASCHER: Yes it is (Laughter).

BURCHETT: And at this point I might, might be able to make an investment type of thing, ah, you know, if I was looking at five or ten thousand dollars, the, what, what do you have an interest

ASCHER: I'll tell you how we work it.

BURCHETT: a set type of thing or can you tell me how that works.

ASCHER: Yes, yes, no, I can tell you exactly how we work it.

BURCHETT: Uh huh.

ASCHER: Basically, the way the loans work is as follows. We do not take long term loans.

BURCHETT: Um hum.

ASCHER: Eight months is it. Because our publishing is set up on the basis of three quarters. Nine months publishing. We don't want to carry debts. Do you follow me?

BURCHETT: I got you.

ASCHER: In other words once a particular publication is out, we clear out all of the debts in that printing and go into another printing.

BURCHETT: Um hum.

ASCHER: So I don't want anything long term.

BURCHETT: Okay.

ASCHER: Eight months is the max.

BURCHETT: Alright, eight months.

ASCHER: That's it. And number two, as far as interest is concerned, I'll be very honest with you. We can and have paid up to prevailing interest rates. However, we prefer zero interest or two to four percent loans. Most of our loans are in the six to seven percent range. Now I'll be very blunt with you on this thing. If people can do us the favor of giving us loans at no interest, that is a contribution

BURCHETT: Um hum.

[34] ASCHER: Follow me?

BURCHETT: Right.

ASCHER: The point is, is that we do not want, anybody whose got money sitting in a passbook that's earning five and a quarter . . .

BURCHETT: Um hum.

ASCHER: asking us for seven. That would be ludicrous.

BURCHETT: Um hum.

ASCHER: The point is, that if somebody, has money in a CD, in a stock, in a bond, if it's sitting in the stock market, number one you're going to lose it; number two, you're financing narcotics trafficking.

BURCHETT: Um hum.

ASCHER: If it's sitting in a bank . . . well you're in Virginia, but we're talking to people living in Maryland, and we still have a hundred and eighty thousand people in this state who will not see their money for five years.

BURCHETT: Yeah.

ASCHER: And I don't know if people realize it, it's not been made public, but unlike the Ohio banks, in this state if you had more than five thousand in a number of different banks, you will not earn any interest or see your money for five years and it's really upsetting . . .

BURCHETT: Yeah, I know a lot of them got, got nailed up on the savings and loan thing.

ASCHER: Well yeah, and most of the people, I'll tell you something very honestly, most of the people who had fifty to a hundred thousand dollars were not wealthy people. You know they were people who worked at a steel plant for forty years

BURCHETT: Um hum.

ASCHER: You know, and saved every dime. And they've got a hundred thousand dollars sitting in the bank, you know, and they'll never see it. I mean in five years I don't believe for a minute, they'll never see that money.

BURCHETT: Um hum.

[35] ASCHER: So as far as putting money with us, I can't make it any fairer to you than it is.

BURCHETT: Uh huh, right.

ASCHER: It's only one favor for us.

BURCHETT: Um hum.

ASCHER: It makes possible, for example, on the VonDerHyde book, our cost per copy when we do a very large lot, was three dollars and thirty-three cents.

BURCHETT: Um hum.

ASCHER: The book sells for ten dollars. Now a certain number have been sold to book stores which means they get fifty percent. You follow me?

BURCHETT: Right.

ASCHER: A certain number are sold by us. All that we're interested in being able to do is not making any money. We're not interested in that. All we want to be able to do, which we've done for thirteen years, is pay back every person, which we always do.

BURCHETT: Um hum.

ASCHER: And have money to go into another production. That's it.

BURCHETT: Um hum.

ASCHER: So, eight months is max. We send out a legal document.

BURCHETT: Um hum.

ASCHER: We do not want high interest rates, and we're not going to make you any money.

BURCHETT: Um hum.

ASCHER: I mean I have to be honest.

BURCHETT: Right.

ASCHER: People do us the favor of actually saying this will make possible, you know

BURCHETT: Um hum.

[36] ASCHER: Two thousand, three thousand, four thousand, extra copies of

BURCHETT: But the principal, the principal itself, is that a, is that a secured ah agreement, or

ASCHER: No, it's not a collateralized loan, no.

BURCHETT: Um hum.

ASCHER: No, the only loans that we've ever put out collateral on are much larger kinds of things. I mean we've done, ah, investments in our publishing company, plant and equipment, and so forth, but we're talking about you know fifty or a hundred thousand dollar kinds of investments . . .

BURCHETT: Right, yeah.

ASCHER: On loans of five or ten thousand dollars. We send out a legal document but it is not backed up by collateral in the sense of equipment or something like that; no, we won't tie up our publishing,

BURCHETT: Um hum.

ASCHER: We own our own presses and so forth and we won't tie any of that up.

BURCHETT: Sure.

ASCHER: So no, but

BURCHETT: Okay.

ASCHER: That's basically it. I mean, from the standpoint of safety, I think that there's no comparison, but, I don't ask people to loan money to us because we're safer than the banks. We are.

BURCHETT: Right, um hum.

ASCHER: But that's not the reason.

BURCHETT: (Laughter)

ASCHER: Oh, no, really, that's not the reason. I mean I could call up everybody and that's not the reason.

BURCHETT: Um hum.

ASCHER: So gifts are better than loans.

* * * *

[58] ASCHER: Ah, let me just be blunt. We're not in sales.

BURCHETT: Um hum.

ASCHER: And we're not interested in you know public relations. And we're running a war.

BURCHETT: Um hum.

ASCHER: And people's lives are on the line in this thing. And people like yourself, you know, just have to take that extremely seriously.

BURCHETT: Um hum.

ASCHER: And that's the only way we can operate

BURCHETT: Right.

ASCHER: with people.

BURCHETT: I don't, I don't have any problem taking it serious, ah, Rochelle, it's like I told him, in fact, I've taken, it very serious I think, I mean it's ah, and maybe it's just me, bu[illegible] I have never in my life before ever committed to, ah, you know, send somebody a 1,000 dollars or give somebody 1,000 dollars over the phone, or $2,000 or $3,000, and you know as I explained to you the other day I was looking, at a whole lot of things, one was ah, that I didn't go into was ah, the way ah, the real estate market is doing right now. To a degree it's wonderful, on the other hand it's kind of like a hour glass with all of the

ASCHER: No, no, no. Look, I mean, you know, I don't know if, I mean, if it takes anything more than what's happened in the stock market over the last 48 hours, for people to understand what's happening.

BURCHETT: Um hum.

ASCHER: I mean, both the real estate market based on the new tax law and the entire U.S. economy is going to blow.

BURCHETT: Um hum.

ASCHER: And I, people have no conception of what we're talking about. I mean when I say that, I mean, the best image that people have is 29, but you're talking about something far more catastrophic.

* * * *

[62] ASCHER: I want to tell you the financial, situation. And then what I want, no matter what you're going to do is an answer and to take care of it, because otherwise we just can't operate

BURCHETT: Um hum.

ASCHER: with people and again, as I said, it's not to chew you out or to be rude, but we cannot operate on the basis of calling somebody three times for a contribution and making all kinds of convoluted arrangements

BURCHETT: Um hum.

ASCHER: and so forth, that we can't do.

BURCHETT: Right.

ASCHER: You know if we lose it, then that's life, we will lose it.

BURCHETT: Um hum.

ASCHER: But that's you know, that's the state of affairs. Because, you know, as I said, you know, the money to us is very sim-

BURCHETT: Um hum.

ASCHER: And we run a very simple straightforward financial operation. It takes us 600,000 dollars every single week

BURCHETT: Um hum.

ASCHER: for what we do.

BURCHETT: Well let me

ASCHER: We fight for that the way that, George Patton fought for gasoline.

BURCHETT: Let me ask you this then, ah, you know,

BURCHETT: let's, let's say that I agree with everything that you say from the standpoint of what is happening. What, what is the, what's going to be done about it, what I mean I

* * * *

[84] BURCHETT: Um hum.

ASCHER: It's just that normally we don't. I, normally when people, make us a loan they go between 5 and 25 because it's something which they can't give.

BURCHETT: Um hum.

ASCHER: And therefore they make it as a loan. I mean we don't take any loans that we're not going to pay back. There's no point.

BURCHETT: Yeah.

ASCHER: I mean not, we're not running a business. We're running a political organization.

BURCHETT: Right.

ASCHER: And we want people's support.

BURCHETT: Um hum.

ASCHER: We're not interested in, you know, screwing around.

BURCHETT: Yeah.

ASCHER: So, the point is that generally speaking, as I said, it's not normally the case that we take that

BURCHETT: Um hum.

ASCHER: $1000 loans. There's no law that says we can't.

BURCHETT: Right. Well my, basically as I was telling Fred, I'm not really in a position right at the moment, ah, because of my funds, to go, you know, with any, with any more than what we were talking about from the 1,000 dollar standpoint, that, but that because of some other interests that I've got, I may eventually or may, ah, you know, in the near future, when you've got a project going on, be in a little, better position to do something. And, and that's kind, kind, of what I was telling him. Hey, you know, I don't have any problem with your program but you can't give it if you don't have it, right at the moment.

ASCHER: Yeah, but also I'll tell you the honest truth. What makes people know whether they have it or not is their political commitment. So

BURCHETT: Um hum.

* * * *

[181] people like you doing things you don't think possible, that's what it means.

BURCHETT: Uh-huh, well, would this property still remain in the individual's name that's got it or would y'all be able to transfer that to one of your . . . your ah, . . .

ASCHER: It's been transferred . . .

BURCHETT: . . . corporate o.k.

ASCHER: it's been transferred . . . in other words, the person who currently . . .

BURCHETT: So you would have complete control as far as that goes and not have to worry about some individual?

ASCHER: No

BURCHETT: Uh huh

ASCHER: I mean the problem with Nick Anderson is not that he's not a wonderful individual, the guy is somebody who is wonderful. He's given very large gifts to this organization over the years. He's politically tremendous; very active in the Republican Party, I know him very well.

BURCHETT: uh-huh.

ASCHER: I was with one of the people who met with him to actually sit down and, you know, do the original financing.

BURCHETT: uh-huh.

ASCHER: The problem is that he is financially personally vulnerable because he has lost a fortune. But again, as I said, it's really not a financial question because if we were anybody else . . . which is the same thing with our organization in general, I mean, when we originally started taking out loans, it was 1978. It had nothing to do with our financial capability, ah we published *Dope, Inc.*, and no bank in the country would finance the thing and it had nothing to do with our financial situation. Frankly, by comparison, eh, eh, I mean if we were a business, which we are not, alright, I mean, we are associated with certain corporate entities, CDI is a not for profit corporation, alright? The Fusion Energy Foundation is a tax-exempt foundation. EIR News Services is a corporation, do you follow me?

[182] BURCHETT: uh-huh.

ASCHER: But we don't have any interest in making profit. Any money we make we plow back into expanding publications. I mean we've gone from 10,000 subscribers in January to 200,000 as of now. So that's you know not a small growth . . .

BURCHETT: uh-huh.

ASCHER: . . . at a point where the enemy says they're going to throw everything at us they can to shut us down. I mean I don't know anybody who's done that, you follow me?

BURCHETT: uh-huh.

ASCHER: I mean, that's really tremendous. The thing is is that if we were a business, and we went in strictly as a business to any bank in the country, to do any of these financial operations, you know, relative to any corporation that grosses 30 million dollars a year and that has the number of debts that we have, you know, we'd be considered an excellent financial prospect.

BURCHETT: uh-huh.

ASCHER: Do you follow me? I don't think there is any corporation in the United States that could touch us as far as debts to assets and so forth and so on, do you follow me?

BURCHETT: uh-huh.

ASCHER: The problem is we're not a business . . .

BURCHETT: yeah.

ASCHER: . . . we're an intelligence capability (unintelligible) we're fighting a war and the Soviets have identified us as public enemy #1 and every one of their liberal cohorts, dope lobby, assets in this country has identified us as public enemy #1. I mean, I remember the very first time we financed Dope, Inc. Our financial picture was excellent. It had nothing to do with money. There was no bank in the state of New York because look what was going on, Muriel Seibert, who was the banking commissioner, who was very good, invited us in to testify to stop Hong Kong and Shanghai Bank from buying up Marine Midland. Hongshang was the biggest [183] dope bank in the world at that time and they were trying to buy out the second biggest bank in New York, which at that time was Marine Midland. We were testifying every day; the testimony was all over the press; we were collaborating with members of the Drug Enforcement Administration from the Nixon Administration even though Nixon was no longer in office, these were people who . . . one of the reasons Richard Nixon was Watergate, and I won't go through this now, Larry, was that he was moving against this same Dope, Inc. appeasement crowd, o.k.?

BURCHETT: uh-huh.

ASCHER: The same people that want to make a deal with Moscow are the same people. Their money is made primarily through drugs, like Armand Hammer, alright? I mean these are elements of, the Trust, their money is dope money. I mean, they're not two separate operations, you know, the drug lobby over here and the guys, who want to cut a deal with Moscow over here, they're all part and parcel of the same operation.

BURCHETT: uh-huh.

ASCHER: What we did is we went and borrowed 200,000 dollars from our supporters; we paid everybody back and the book went through 13 editions. You follow me?

BURCHETT: uh-huh.

ASCHER: And, if we had . . . we decided at that point you know, hell, if we're going to pay interest, why should I pay it to a bank if I can pay it to somebody like you, you follow me?

BURCHETT: Sure.

ASCHER: You know and a lot of our supporters gave us money with zero interest. Or interest significantly below what banks were charging.

BURCHETT: uh-huh.

ASCHER: But at the time we did it, we didn't really do it to save money, we did it because politically speaking no bank was going to, you know, was going to finance Dope, Inc . . .

BURCHETT: Right.

[184] ASCHER: . . . and that's the kind of loans that we take. We take loans against publications; we don't take loans against something like Lyn's house, that we're not going to do.

BURCHETT: uh-huh.

ASCHER: So yeah, the thing will be transferred into another individual's hands who I already know who is quite financially sound and good.

BURCHETT: uh-huh.

ASCHER: And in fact, that's one of the reasons why we may only have to come up with 500 instead of 700 because we may be able to refinance a certain aspect of this thing . . .

BURCHETT: uh-huh.

ASCHER: . . . Personally, not corporately, not through a bank. But the fact of the matter is, it's a . . . if it were up to our enemies, they want us out of this thing. September, ah, October 2, it was September 2, we paid 100 grand and we got a month extension. So it's a week from Tuesday.

BURCHETT: uh-huh.

ASCHER: Uh, we've given ourselves a Tuesday deadline because, you know, there are checks to clear, money to be wired, and all that . . .

BURCHETT: Right.

ASCHER: You're not going to do it after Tuesday. In fact, none of that money is even going to come in in the form of checks, it's either bank certified checks or bank wires. We cannot go with out-of-state checks; they won't clear.

BURCHETT: uh-huh.

ASCHER: Now, at the same time that that operation is being won, politically speaking, we have to escalate. We have not put out in a single publication a million run of anything. This will be the first time that we've actually done a run of anything larger than a leaflet in a million copies so this AIDS pamphlet will be a million copies which will be out today.

BURCHETT: uh-huh.

[185] ASCHER: The Quarterly . . . this Economic Quarterly . . . normally the Quarterly has a subscription base I'm going to give you a rough estimate, because I haven't looked at the thing in the last three months, but I think you're talking about 20-25 thousand. Alright, in terms of people who subscribe, corporations who subscribe, alright? This particular issue of the Quarterly is going to go out in triple that number because it's a bombshell because the current banking system is so, is so, you know, the thing is going to blow and everybody knows it. They know our track record is 100% and they know everybody else's stinks so that's basically the two things that have got to come out this week.

BURCHETT: uh-huh.

ASCHER: So I can only take gifts, you know, for the house. I'm not taking any loans.

BURCHETT: uh-huh.

ASCHER: We will not take one dime in loans and once this thing is completed we will own the thing outright. I can take loans on the Von der hyde book and on the production of the Quarterly. Those two things I can do because those bare income.

BURCHETT: uh-huh.

ASCHER: Those are income-bearing accounts . . .

BURCHETT: Right.

ASCHER: . . . so that's the thing,; so I am asking you to increase your loan to us that's #1. I'm asking, for gifts to purchase the house, that's #2, and I'm asking every single person, including people who are not supporters to subscribe to the Alert and to purchase a subscription to the Quarterly. Those three things is what I'm asking financially.

BURCHETT: uh-huh.

ASCHER: And, there is no distinction at this point between finances and politics. None, zero, it would be impossible. There's no way that somebody can do anything politically effective, you know, if Lyn is killed or if this material doesn't get out. It's impossible.

BURCHETT: uh-huh.

* * * *

L. Burchett, Cross
2/3/89
* * * *

[108] give, and would give, wasn't in a savings account at any interest, is that right?

A. At that point there was no money anywhere.

Q. There wasn't any money at that point?

A. That's correct, sir.

Q. And when you did deposit the money in that account it was in a checking account, not a savings account?

A. That's correct, sir.

Q. So you made that false statement about holding the money in a savings account at a certain percent interest to add to your story?

A. That's part of it. What I was creating obviously or trying to create was the most realistic situation that I could. If it was any other citizen involved, and obviously I couldn't say, well, I will have to run over to headquarters and get them to give me $5,000.

Q. Sure.

A. Yes.

Q. But you were saying that although you were getting money at a certain interest rate you were prepared to lend it at a loss to yourself?

[109] A. That's correct.

Q. As a favor therefore to the organization?

A. That's correct.

Q. Not a smart investment?

A. That's correct.

Q. And you were trying to create the impression that you were lending this money because you supported the views and ideals, etc., of the organization?

A. I was, I think, answering more than I was doing anything else with the request that the money be given or be contributed or be lent to them from the standpoint that I needed the money back. It wasn't something I could just give away.

Q. Okay, but even when you were saying—when you were remaining silent by your acquiescence you were supporting these views and from time to time you would say things affirmatively showing that you actually supported their views. You agreed with LaRouche, you agreed with the Soviet—

THE COURT: The tape speaks for itself.

MR. FLANNERY: Okay.

* * * *

[72] A. Yes.

Q. And in that conversation, did she tell you that they were trying to kill Mr. LaRouche?

A. Yes, she did.

Q. And that's before you made the note with the organization, is that right? You made the note on December the 10th, isn't that . . .

A. That's right. This is one of the last two or three conversations that I had with her before I made the loan of $3,000.

Q. Okay. And you were concerned enough about Mr. LaRouche's safety that you wrote that down?

A. Yes.

Q. Do you recall what else she said to you on December 6, 1984, besides the fact that Mr. LaRouche was in danger?

A. Just that they needed that money for security purposes, personal security purposes.

Q. To keep Mr. LaRouche alive?

A. Yes.

Q. Had you followed the broadcasts, therefore, through 1984 of Mr. LaRouche on TV?

A. Yes, I had.

Q. And I take it that you generally agreed with what [73] was being espouse by Mr. LaRouche in those broadcasts?

A. Largely.

Q. Now, you said that you got a loan from a bank, and you did that in and around December of 1984?

A. Yes, I did.

Q. And what was the interest rate on the loan?

A. Sixteen percent.

Q. And the interest rate on the loan you made with the organization was what, ten percent or about ten percent?

A. Sixteen percent.

Q. Sixteen percent? Are these . . . where do we have the notes? Let me direct your attention to #W-14D . . .

THE COURT: D, dog?

MR. FLANNERY: D, dog, yes.

Q. Does the dollar figure on that reflect the amount you had to pay the bank each month?

A. $273.64 was principal and interest on the monthly payments of that loan, which was to be paid back within 12 months.

Q. Okay. And that was the total payment you were to get each month?

A. That's right.

Q. And you were going to make that payment to the [74] bank?

A. That's correct.

Q. And that was all that you owed the bank $273.64?

A. Per month.

Q. Okay. So you weren't going to get anything out of this yourself?

A. No. There was no profit in it for me other than feeling that I was doing something good.

Q. Okay. Now, have you calculated what that comes out to total principal and interest?

A. I have not.

Q. You have not? Doesn't that come out to approximately $3,283 and change?

MR. CHABALEWSKI: Your Honor . . .

THE COURT: He said he hadn't calculated it, Mr. Flannery.

Q. Okay. Do you know how to use a calculator?

A. Yes, I do.

Q. Okay.

THE COURT: You may argue this to the jury. The document will speak for itself, sir. The jury will read the notes.

Q. Do you have the note from the bank with you?

* * * *

[80] Q. Now, during your conversations, were you ever informed of efforts to hamper the organization by, in any way, tying up its finances or harassing those who supported Mr. LaRouche?

A. No, I don't . . .

MR. CHABALEWSKI: Your Honor, excuse me. No, I'll let him answer.

THE COURT: You may answer the question.

A. Not about the finances being hampered, but there were references to so-called eastern establishment forces that would like to silence the LaRouche machine.

Q. And you believed that was true yourself, didn't you?

MR. CHABALEWSKI: Your Honor, whether this witness believed that or didn't believe that, I think it's . . . he has testified that he was in agreement on certain principles. But that's not the issue here.

MR. FLANNERY: That is part of the issue, Your Honor, it certainly is.

THE COURT: The Court sustains the objection.

Q. Is there any loan that you intended to make to the [81] organization that you intended yourself to make some sort of profit out of doing that?

A. There was none.

Q. Do you recall being informed of a problem with First Fidelity Bank, that the monies in First Fidelity Bank were tied up in any way, do you recall being informed of that?

A. Yes, I was.

Q. Do you recall Mrs. Ascher telling you that, in and around December the 6th of 1984?

A. I recall being told that by her. I don't recall the date. I think it was in December.

Q. Okay. Do you recall that you were being told about that before you made the loan that you did make?

A. No.

Q. You don't recall?

A. I was not told. I'm sure I was not told that prior to making that $3,000 loan.

Q. Are you sure of that?

A. Yes, I am.

Q. So you believe it happened after you made the note?

A. Excuse me?

Q. You believe, therefore, you were informed about the

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C. Waddell, Direct
2/23/89
* * * *

[80] Q. Okay, now did you agree to loan money to Rochelle Ascher?

A. Yes.

Q. You remember how much?

A. You mean on that one time?

Q. That first occasion?

A. No, I can't, because since this stroke I can't remember if it was $5,000 or $1,000 or whatever it was.

Q. So we are clear this wasn't the first—

MR. FLANNERY: I'm sorry, Your Honor, I thought the witness said she couldn't remember because of a stroke.? Do we—has the witness lost recollection because of an illness?

MR. CHABALEWSKI: Some.

MR. FLANNERY: Your Honor, then I think we have to have some voir dire for competency.

THE COURT: The Court will not accomplish that. Your objection is overruled. The witness may testify as to what she remembers.

BY MR. CHABALEWSKI:

Q. Ms. Waddell, I would like to show you what [81] has been marked as W-6(a). Take a look at that piece of paper?

A. Okay.

Q. Do you know what that is?

A. Yes.

Q. What is it.

A. My check.

Q. Did you write that check?

A. Yes, I did.

Q. Did you write that check for money to Rochelle Ascher?

A. Yes, I did.

Q. Was that the first check you wrote to Rochelle Ascher?

A. Yes, the 18th was the first time I wrote one, yes.

Q. Was that also the first time you talked to Rochelle Ascher?

A. Yes.

Q. How much was that check for?

A. This was $5,000.

Q. Okay, now how long of a period of time did you continue to talk to Rochelle Ascher about the [82] LaRouche organization and about money?

A. It was at least three or four months.

Q. Now, during that three or four month period did you talk to other people that said they were associated with Rochelle Ascher?

A. Yes.

Q. Do you remember their names?

A. Well, I can remember Stu Rosenblatt.

Q. And Stu Rosenblatt, do you remember how he was related to Rochelle Ascher?

A. I thought they worked with the same office or the same group or something like that.

Q. Now, as you sit here today do you remember specifically what day you talked to Rochelle Ascher or what specifically was said on any given day to Rochelle Ascher?

A. I can't remember right now, but June 10 and 14 and August and all the other things like that.

Q. Okay, but did you—

A. I can tell it more by the text than the dates.

Q. That last statement I think your speech problem came in. What did you want to say?

[83] A. I said the checks were pretty much dated according to the date that we did talk.

Q. Okay. Let me show you the next check. Do you recognize that check?

A. Yes, I do.

Q. Is that a check you wrote?

A. Yes, it is.

Q. Is that a check you wrote at the request of Rochelle Ascher?

A. Yes.

Q. Now, these two checks in the left bottom hand corner where it says memo, they don't have any writing by you?

A. No.

Q. The money that you gave, and the first check was for $5,000, the second check for $2,000, did you intend on giving that as a gift, I mean to give it away and not get it back?

A. No, I planned I was supposed to get it back. That's the reason I was donating.

THE COURT: For the record, Mr. Chabalewski, what's the number of that exhibit?

* * * *

[102]tell you anything to suggest that your money might not be returned to you?

A. No, I would have stopped completely. I never would have donated any more.

Q. Ma'am, the money that you did loan them, what was that money designed for? What was it being held by you for?

MR. FLANNERY: Objection, Your Honor.

MR. CHABALEWSKI: Your Honor, counsel has—

THE COURT: I will hear you at the bench, gentlemen.

(Whereupon, a bench conference was held.)

BY MR. CHABALEWSKI:

Q. Ms. Waddell, along this same time period from about June through approximately January or February of 1987, did you also give money to the organization?

A. Not that I'm aware of.

Q. Do you remember giving sums of money that you didn't want to get back or that you didn't expect to [103] get back?

A. No, I thought I would get it all back.

MR. CHABALEWSKI: I would like to approach the bench, Your Honor.

THE COURT: Yes.

(Whereupon, a bench conference was held.)

BY MR. CHABALEWSKI:

Q. Ms. Waddell, I just asked you if you remembered giving money to the organization and when I mean give I am talking about giving it without any, not expecting it

to be returned, and you indicated that you didn't remember doing that. I would like you to take a look, if you would, at W-6(o) and I would like you to read that to yourself, if you could.

(The document referred to was marked for identification as Commonwealth's Exhibit No. W-6(o).)

BY MR. CHABALEWSKI:

Q. It's a fact, is it not, that from June of 1986 through approximately February of '87 you did, in fact, give some money with no expectation of return to

[103A] MR. RUSSELL: Can we approach the bench, Your Honor? The witness . . . the Court has advised . . .

MR. FLANNERY: I appreciate the Commonwealth . . . it's exactly the problem that I pointed out at the outset of this witness' testimony. This witness' recollection is so bad, she doesn't even remember what she says from one . . . to the next. I addressed her . . . our conversation in which she said that she . . . my recollection is not so good anymore. At the very outset of this examination I tried to cure that by proposing to address her competency at that stage. Now we have the most recent manifestation . . . appropriate disclosure by the Commonwealth that she has . . . put the statement on the record and to the jury that Commonwealth's own witness has previously impeached herself.

MR. RUSSELL: . . . cross examination . . . conversations with counsel . . . counsel does not have the witness available to impeach. I think he's gotten himself in a problem in terms of how to impeach . . .

MR. FLANNERY: Well, Your [103B] Your Honor . . .

THE COURT: Wait just a minute . . . witness' memory . . . now, if a party on either side has evidence which needs to be corrected, we're here to provide the truth . . . but we're not here to play a game. I'm going to permit you

to rehabilitate this witness . . . in the sense so a misimpression is not given to the jury. We will nevertheless reserve your objection . . .

MR. FLANNERY: Thank you, Your Honor.

[104] this organization, is that correct?

A. There could have been very little. Most of it—or I couldn't have contributed.

Q. In terms of the total amount that you gave to them expecting it to be returned, it was a small amount, correct?

A. No, it was a large amount for me.

Q. What I am asking you is—let me ask you this, how much did you loan?

MR. FLANNERY: Objection, Your Honor. This leading has gone far enough, I think.

THE COURT: I think she has already testified that she gave small amounts. I sustain the objection.

MR. CHABALEWSKI: Thank you very much, ma'am.

THE WITNESS: Small amounts?

BY MR. CHABALEWSKI:

Q. Let me ask you a question, Ms. Waddell, how much did you lend to the organization expecting it to be returned to you?

C. Waddell, Cross
2/23/89
* * * *

A. About $40,000 at least.

Q. Thank you.

MR. CHABALEWSKI: Your Honor, we would move all the exhibits that we have had examined.

THE COURT: Objection, Mr. Flannery?

MR. FLANNERY: I want to voir dire on this.

THE COURT: You may voir dire.

MR. FLANNERY: Thank you, Your Honor.

VOIR DIRE EXAMINATION

BY MR. FLANNERY:

Q. Good morning, Ms. Waddell. Directing your attention to W-6(o), do you recall receiving that letter?

A. Well, I do from reading it, but that's been a long time ago.

Q. And do you recall the amount indicated in there?

A. Yes, and that I remember because that's my

* * * *

[112] Q. You had never had any conversation about the LaRouche organization with anyone before that?

A. No.

Q. You had never subscribed to any magazine involving the LaRouche organization?

A. No.

Q. You had never met anyone at an airport?

A. What?

Q. At an airport or a bus station or a post office?

A. No, no, no.

Q. So the first conversation you had was on the phone with Ms. Ascher with any representative of the LaRouche organization, is that correct?

A. Yes.

Q. What was said? What did you say and what did she say?

A. She was telling me about the organization and who they were raising money for it and all this and needed the donations and money and [113] so forth like that.

Q. Did she discuss any politics with you?

A. Well, she might have, but it didn't—it wasn't that important to me then because the main thing was you had to make a donation, you got the interest rate, you got your money back.

Q. When you said you had to make a donation isn't it a fact of the matter in your first conversations with Ms. Ascher you made contributions?

A. Yes.

Q. And didn't you make substantial contributions, $1,000?

A. Yes.

Q. Do you recall how much the first contribution was?

A. Well, it would be the first check that we have here.

Q. Okay.

A. $5,000.

Q. Let me direct your attention. Directing your attention to W-6(a)?

A. Yes.

[114] Q. That check for $5,000 was a contribution, is that your testimony? Following your first conversation with Rochelle Ascher?

A. What do you mean?

Q. It was a contribution. You just said the first check was a contribution.

A. Well, you were contributing, but you were supposed to get your money back. That was the conversation that was talked about most all the time was you would get your money back.

Q. Ms. Waddell, I would like to ask you something about your illness in March of '87, you had a stroke, is that correct?

A. Stroke, yes, that caused my double vision problem and so forth, yes.

Q. And it also creates some problem with the speech that you had earlier?

A. Yes, but it didn't happen until about three or four months ago that I started getting—

Q. That you started having the difficulty speaking?

A. Yes.

Q. Since you have had your stroke haven't you [115] had some difficulty with your memory.

A. Yes.

Q. And some things you can remember and some things you can't remember, is that right?

A. Well, I wouldn't say it that way. Some times I don't remember, like the dates when you ask, when dates she called or something like this, now that—I don't go down to that for two years ago almost.

Q. Ms. Waddell, you remember a short time ago while the Commonwealth was asking questions they asked you if you made any contributions at all and you said that you had not, do you recall that?

A. Contributions? I think the problem is we are misunderstanding the definition of contribution.

Q. You understand if you give a contribution that's it. That's a gift.

A. That's' nothing. I mean you don't get anything back.

Q. Right, and didn't you tell the Commonwealth before you came into this courtroom that you made gifts, expecting nothing back?

A. I don't remember telling them that.

Q. Do you recall being asked here if you ever [116] made a gift expecting nothing back?

A. A couple of cases here they say in here, you know.

Q. Do you recall making those gifts that you see on those papers there?

A. The ones that were charged to my credit cards, yes.

Q. So when you see the paper then you remember making the gifts?

A. Yes, as long ago as it would be, yes.

Q. So do you have to see that paper in order to recollect what happened?

A. Yes, particularly how much would be gone and I wouldn't get back, because most of it I thought I was getting back.

Q. That's your present recollection?

A. That's where it started out to be, yes. Or I would have quit. I would have stopped way before this.

Q. How often have you talked with the Commonwealth, can you remember?

A. No, it's only about three times I think.

Q. Do you recall how long was each time you

* * * *

[118] MR. CHABALEWSKI: Your Honor, for the record, Ms. Waddell conversed with me.

THE WITNESS: That's right, I don't think I met the other one, no.

BY MR. FLANNERY:

Q. You're not sure?

A. I don't remember it. We never did.

Q. Do you remember speaking to Mr. Chabalewski?

A. Yes.

Q. Do you remember him asking you if you ever made a gift to the organization?

A. Yes.

Q. What did you tell him?

A. I think I told him then I might have given a small one.

Q. That's what you think?

A. Yes.

Q. When you were asked today had you ever made any gifts you said no at first, is that correct?

A. The first time, yes.

Q. And unless and until you saw the piece of paper reflecting a $1,000 contribution you didn't [119] remember

that you had made a gift, is that right? Do you remember making a $1,000 contribution.

A. Several of them, sure.

Q. Do you remember what the total amount you contributed was, how many thousands of dollars?

A. Yes, it was almost $50,000.

Q. You contributed $50,000?

A. Yes, sir.

Q. Understanding that that means a gift, something that you don't get back?

A. No, no, no, no sir.

Q. Let me try again. A gift, that is actually giving the money expecting nothing in return, do you remember making that --

A. If I did that it would probably be $5,000, that would have been it roughly.

Q. So it was $5,000?

A. I'm not saying perfect, you know, firm, but it could have been. It wasn't that much because most of the others were to get back.

Q. Now, directing your attention again to this June 18, 1986 check, W-6(a) for $5,000. As you look at that now do you remember that that was a gift? You

* * * *

[123] got or not.

Q. Let's go back to the June check, the June 18, 1986 check for $5,000. What were the terms of that note?

A. Well, when I first talked with Rochelle everything I would be refunded. I would get it back.

Q. I know you said that. I'm asking you about this check. What was the term of that check?

A. I would get it back.

Q. You were just going to get that back?

A. Yes.

Q. What was the interest rate going to be?

A. Some of them didn't have interest rates then and some of them did when you started getting it. Six to eight percent you get it back in six months or quarterly or whatever or something.

Q. So you don't have any interest rate for that check?

A. No.

Q. Do you know how long that check was supposed to correspond to a note?

A. The same thing, six months.

Q. Okay, you are absolutely sure it wasn't [124] shorter than six months, is that right?

A. I don't think so, no.

Q. Now, the second check that you referred to was for $2,000?

A. Yes.

Q. That's on July 8.

A. July 8,

Q. July 8, 1986 and that doesn't indicate any note or a loan, is that right?

A. Well, I didn't write it there, no.

Q. Now, when you gave Mr. Bryant a bunch of papers and you took this from those papers, did you give him any loan or promissory note.

A. That was getting to be a problem because as I say the way the conversation was on the phone I would get my money back or else I would never have just thrown this in.

Q. Didn't you put this money in because you agreed with the issues they were espousing, Ms. Waddell?

A. No, I agreed with them because I would get some funds back.

Q. Did you ever discuss any political issues with them?

[125] A. No.

Q. Did they ever discuss any political issues with you?

A. Not really.

Q. Never mentioned anything about any political issue when they spoke to you, Ms. Waddell?

A. They said something, but that was not it.

Q. You don't remember that?

A. The main thing was to get the money.

Q. Now, this check, W-6(d), doesn't say loan and the question was did you have any loan or piece of paper that corresponded to that check that you received at any time?

A. That's what I say, I think not, but I don't know. There could be still some card or something back at the apartment. I just don't know. I can't be honest about it.

Q. Now—

A. Why do you keep asking so much about that?

Q. I'm sorry, it's just the framework. I ask the questions. I can't engage in a conversation. Under different circumstances perhaps I could.

Neither of these first two checks resulted

* * * *

[128] organization?

A. Yes.

Q. Do you recall what issues?

A. No.

Q. Do you recall why you were doing it?

A. Mainly I was doing it because I was getting my money back and I was getting interest rate on it.

Q. But there was no interest rate on the gift. Do you recall making any contributions to a defense fund? A gift to a defense fund for litigation?

A. Who was it made out to?

Q. To the Constitutional Defense Fund, do you remember doing that?

A. No, I don't.

Q. Directing your attention to what has been marked Defendant's exhibit 95 for identification. Do you recognize that check?

A. Yes.

Q. Do you recall making a contribution to the Constitutional Defense Fund?

A. That's what CDF is?

Q. You're saying now you don't know what it was?

[129] A. No, it is made out to CDF, if that is what it stands for then we did.

Q. Is that your handwriting?

A. Yes, that is my handwriting.

Q. This is January of 1987?

A. Right.

Q. And you have not written on there loan, is that right?

A. That's right.

(The document referred to was marked for identification as Defendant's Exhibit No. 95.)

Q. So it was long after any problems were realized with regard to loans, isn't that right?

A. Well, this was getting to be the end.

Q. The end of what.

A. My donating completely.

Q. But this is definitely a gift, isn't it?

A. Well, I imagine so, but I don't have it written down.

Q. Now, it was several months after that that you had your unfortunate stroke?

[130] A. Yes.

THE COURT: AT this time, ladies and gentlemen of the jury and counsel we will recess for lunch till 1:00.

(Whereupon, a luncheon recess was taken from 12 p.m. to 1 p.m.)

* * * *

[132] Q. As I understood your testimony you said that one of the reasons that you loaned money to the organization was that they were paying six percent, which was better than you could get?

A. Six, some were eight percent, right.

Q. Now, as to the six percent loans, weren't your funds in the Navy Federal Credit Union at the time?

A. No.

Q. They were not?

A. No.

Q. Now, you said that you made these loans in part because of the interest rate, but let me call your attention to—do you recall making loans at zero percent interest?

A. Yes, yes, but you got your money back still.

Q. Directing your attention to W-6(w) and W6(y), you made those loans at zero percent, right?

A. Yes.

Q. It's your testimony you could have gotten better interest some place else, right?

A. Well, if I did, but I wasn't going through that then. I had these already in trust funds or something like that, so—

[133] Q. Do you recall the conversation you had when you made these loans at zero percent?

A. Yes.

Q. Do you recall saying you wanted to support the organization and that's why you were making zero percent?

A. Well, I wouldn't say because I was supporting. Sometimes it was a method of asking a question.

Q. I'm sorry.

A. I said it was a method by which I asked the question, if you are yelling out or screaming or going real fast and all those kinds of things.

Q. You were going real fast?

A. Yes.

Q. Now, you made these loans in November and December of 1986, is that right?

A. Right.

Q. You recall there had been a raid on the headquarters of LaRouche organization?

A. No.

Q. You didn't know that.

A. No, I did not.

* * * *

C.E. Newell, Direct
2/24/89
* * * *

[159] A. My name is Carlos Ethan Newell. Last name is spelled N-e-w-e-l-l.

Q. And where do you live Mr. Newell?

A. In Forrest Park, Georgia.

Q. Is that a suburb of Atlanta?

A. Yes it is.

Q. And how long have you lived there?

A. In two different locations, twenty-three years.

Q. And what do you do for a living, Mr. Newell?

A. I'm employed by the City of Atlanta, Board of Education.

Q. Did there come a time in 1984 when you became familiar with individuals in organizations affiliated with Lyndon LaRouche?

A. Yes, sir.

Q. And how did you first become aware of these organizations?

A. The first time I became aware of them was noticing a group of people at the Atlanta Airport selling, I believe, Fusion Magazine.

Q. And do recall when that was?

[160] A. Probably about a year before the time that I started dealing with them.

Q. Would that have been 1983?

A. Somewhere around '83.

Q. And when did you have your first dealings with these people?

A. Approximately a year later, I met a group of them at the Forrest Park Post Office, and took several fliers and talked to the people there, and was invited to a meeting at the library, close to where I lived. And it was how I actually got in, and was introduced to, and met these people.

Q. And, after meeting these people, did there come a time when you received telephone contact from Rochelle Ascher.

A. Yes, sir.

Q. And when did that happen?

A. My memory doesn't serve me well enough to tell you exactly how long after I first met them, but it was not very long, maybe a month or two at the very most, after having attended some of their first meetings.

Q. As a result of conversations with Ms. [**161**] Ascher, did you have any financial transactions?

A. Let me see, per, one per phone call, she said that they desperately needed some money to raise money for some project, I do not remember exactly which project at this time. But she asked for some money and the most that I could come up with at that time was a check for $250.00, which they sent a special courier around to my house to pick up.

Q. Now, how long before that transaction, that $250.00 transaction, did you first get a phone call from Ms. Ascher?

A. I don't recall exactly.

Q. After making this $250.00 transaction, did you receive anything in the mail. Did you receive anything as a result of your $250.00 transaction, to confirm that in the mail?

A. Yes I did.

Q. I'll show what is already in evidence is Commonwealth Exhibit LF22A, and ask you if that is what you—a copy of what you received in the mail?

A. Yes sir.

Q. Now, the date on that is what, sir?

* * * *

C.E. Newell, Direct
2/27/89
* * * *

[8] CARLOS NEWELL, having been previously duly sworn by the Clerk, was examined and testified as follows:

CONTINUATION OF DIRECT EXAMINATION

BY MR. RUSSELL:

Q. Mr. Newell, good morning. On Friday you had testified about your $250 loan on February the 8th, I believe it was, and we just introduced the original of your loan on February 22nd of 1985, for $2,250.

The February 22nd loan, if you would, sir, do you recall on what day you had your conversation with Mrs. Ascher about loaning this money?

A. I really don't, but it would have been within a week to two weeks prior to that date. It was a very short period of time.

Q. Now, if you would, as best as you can recall, specifically say . . . tell us what she said to you about loaning this money and what you said to her during this conversation?

A. Again, my memory doesn't serve me exact, but she had a particular reason for impressing upon me the need that they had to raise money to print, I believe, a book called *Dope, Inc.*, and that they needed enough money to bring this to fruition.

I explained to her that I did not have any more [9] ready cash. And the reason that I told her that I did not have the ready cash was that I had had several medical expenditures and it had taken all of my normal cash flow up.

I explained to her that I did not have any money to donate, no matter how small a sum. She approached me

with the idea of loaning them the money off of my Visa credit card.

I explained to her that I was willing to do that if she could guarantee to me that I would not lose the money because I could not, at that point, financially lose any amount of money, not even $50.

She promised me that there would be no problem whatsoever. That they did not have any problems at all in repaying their debts. That they just simply needed extra money at that point to make this large publication that they were working with. And she promised me over and over again that there would be absolutely no problem with repayment.

So I agreed to loan them money off of my credit card at the interest rate that my credit card was presently at so that there would not be any profit made on my part.

[10] Q. And what was the interest rate on your credit card at the time?

A. I believe it was 19 and 1/2 percent.

Q. And what is the interest rate on your note that you received as a result of this loan?

A. 15 percent.

Q. Was that in accordance with what you understood your agreement was?

A. No, it was not.

Q. After you received this note, when were you supposed to get your first payment?

A. This particular one, it was the entire sum was to be paid at one lump sum at the end of 180 day term.

Q. And the end of the 180 days would have been approximately when, sir?

A. That would have been six months later, so that would have been . . .

Q. Would that be August?

A. August or September, some time.

Q. It was a six month note.

A. Yes.

Q. Six months after February the 22nd?

A. Yes.

* * * *

G. Thompson, Direct
2/27/89
* * * *

[44] Q. Mr. Thompson, where do you live?

A. In Madison, Alabama.

Q. And where is Madison, Alabama in relationship to another major metropolitan center in Alabama?

A. It's a suburb of Huntsville.

Q. What do you do for a living, sir?

A. I'm a supervisor at Dunlop Tire.

Q. And how long have you been working for Dunlop Tire?

A. 38 years.

Q. Mr. Thompson, I'd like to call your attention if I could to Los Angeles Airport in 1981. Did you have occasion to be in Los Angeles Airport at that time?

A. Yes, I did.

Q. Did you have occasion to see a booth or . . .

MR. FLANNERY: Objection, leading.

THE COURT: Cure the objection.

Q. As you were in Los Angeles Airport, did anything unusual happen?

A. I saw a sign, something about Jane Fonda.

Q. What did you do?

* * * *

[51] get enough out to make it leading.

THE COURT: Let him finish his question and then I'll rule on the objection.

MR. CHABALEWSKI: I'll withdraw the question, Your Honor.

Q. What did Mr. Rosenblatt say to you in this conversation in the fall of 1982?

A. There was going to be a meeting at the Holiday Inn. There were some people that were going to be there from Birmingham. I think they were going to go on space . . . go to the Space Museum.

Q. Before this call in the fall of 1982, had you talked to Mr. Rosenblatt before?

A. There may have been one or two other occasions on the telephone.

Q. Did Mr. Rosenblatt tell you anything about who he was associated with?

A. Yes.

Q. What did he tell you?

A. He was the southeast coordinator for the LaRouche organization.

Q. And did he tell you where he was calling from?

A. Yes.

[52] Q. Where, sir?

A. Baltimore.

Q. Now, this meeting in Huntsville, did you go to this meeting?

A. Yes.

Q. Now, from the fall of 1982 to approximately June of 1984, did you go to any other meetings?

A. I went to a number of meetings.

Q. Approximately how many meetings would you say you went to?

A. Probably as many as six or eight.

Q. And do you remember where these meetings were?

A. Some were in Huntsville. One was in, I think, Hoover, Alabama. I think there was one in Baltimore and maybe one in Alexandria.

Q. Just so we know where Hoover, Alabama is, where is Hoover in regards to a major city in Alabama?

A. Just south of Birmingham.

Q. You've indicated that you went to a meeting in Baltimore. Do you remember where you went to a meeting in Baltimore?

A. I believe it was in a church basement. I'm a little bit confused; one time I went to the office on [53] Tyson.

Q. On Tyson Street?

A. Yes.

Q. Now, when you went to these meetings, very generally, what happened at these meetings?

A. Well, they had speakers.

Q. And what happened with the speakers, what would you do?

A. Well, there would be a briefing on the world situation. There might be an emphasis on economics or something like that.

Q. Now, as a result of going to these meetings, did you meet anybody else associated with Stuart Rosenblatt?

A. Yes.

Q. And do you remember who you met?

A. I met a good many people, but as far as names, I maybe could remember four or five names.

Q. And who do you remember?

A. Marsha Freeman, Richard Freeman, Larry Freeman, Alan Ogden, Karen Noffsinger.

Q. Do you remember any other females that you met?

A. You know, Shelly Ascher, John Ascher.

Q. Now, specifically Shelly Ascher; do you remember [54] when was the first time you came in contact with Shelly Ascher?

A. It was probably in the Baltimore meeting.

Q. And did you ever talk to Rochelle Ascher on the phone?

A. Yes.

Q. And do you remember approximately when it was that you talked to Rochelle Ascher on the phone?

A. It was in early 1984.

Q. And when you say early 1984, what month are you talking about?

A. Probably started in January or February.

Q. Now, the conversations on the phone, who initiated the conversations on the phone that you had with Rochelle Ascher?

A. She would call.

Q. And when she would call, what would she talk to you about, generally?

A. There was an election, a primary election and there was a tremendously pressing need for some immediate funds.

Q. And in January of 1984, did you know where Rochelle Ascher worked at that point in time or where she [55] was stationed?

A. Well, I believe she was stationed in Baltimore.

Q. Now, I would like to call your attention, if I could, to approximately March 15th of 1984. Did you get a call from Shelly Ascher?

A. Yes.

Q. And did the subject of money get discussed on the 15th of March, 1984?

A. Yes, sir.

Q. And what did you agree to do in regards to money and Rochelle Ascher on the 15th of March, 1984?

A. I agreed to loan money.

Q. Now, I'd like to show you what is marked as W26B. (WHEREUPON, Commonwealth Exhibit #W26B, previously marked for identification, was referred to.)

Q. After you agreed to loan money to Mrs. Ascher, did you get something in the mail?

A. Yes.

Q. And was that what you got in the mail, W26B?

A. Yes.

Q. And does that appear to be in the same condition as when you received it?

A. Yes.

* * * *

G. Thompson, Cross
2/27/89
* * * *

[82] MR. CHABALEWSKI: Your Honor, what's the relevance?

MR. FLANNERY: Credibility.

THE COURT: Sustained.

Q. Did you read in the magazine that it said that it was a nonprofit corporation, the magazine you received in the mail?

A. Yes, I believe I did, yes.

Q. So you knew it, then?

A. (Nods head.)

Q. You have to say something audibly for the record.

THE COURT: Argumentative.

Q. Now, when you made your $4,000 loan to the Fusion Energy Foundation, you made that on two credit card charges, is that right?

A. Well, this $4,000 was on one credit card.

Q. Was it necessary for you to make two different credit charges to make that equivalent $4,000 loan, if you recall?

A. I don't directly recall. I think it was a Visa card. I had two separate cards.

Q. Let me direct your attention to this document

* * * *

[85] Q. Now, your first one at the airport, that you filled out a slip for?

A. I put it on a credit card and I don't recall whether there was a slip or not.

Q. And then you filled out information at the airport, didn't you?

A. I just remember signing a Mastercard sheet. I don't recall any other slip.

Q. Do you ever recall seeing a form like that reflecting the fact that it was a nonprofit organization?

MR. CHABALEWSKI: Your Honor, that's . . .

THE COURT: He's already testified that he had read in the magazine that it was a nonprofit organization. Move on to another line of inquiry.

MR. FLANNERY: Yes, Your Honor.

Q. So you carried these charges, therefore, at 19.8 percent, is that your testimony?

A. Yes.

Q. And so when you made this loan, you didn't do it to make any money off it?

* * * *

[88] Otherwise, it becomes compound. Anything comes in from anybody at any point in time. And I think that we're entitled to have a foundation as to what conversation, if anything, was said, particularly if we're looking at a conversations between the Defendant and the witness.

MR. FLANNERY: Well, after he identifies the individual, then we'll lay the appropriate foundation of time, identity, place and determine the admissibility, then. I can . . .

THE COURT: Your question didn't look to the identity of any particular individual, except Mrs. Ascher. Cure the objection.

Q. Did any representative of the LaRouche organization ever advise you how your money was going to be used, the money you were lending?

A. Each time there was a phone call about a pressing financial need, it wasn't necessarily directed to Campaigner or Fusion Energy. It was a broadcast that possibly the money had to be on hand by Wednesday or Thursday and that it was, you know, an amount like $220,000 and they only had two or three days to raise it. And I was not aware, exactly, that Fusion Energy or [89] Campaigner was receiving this money.

Q. Okay. And were you so advised by Mrs. Ascher about the pressing need for money?

A. Absolutely.

Q. So, you were put on notice that they were in dire straights to get money, isn't that right?

A. They were in dire straights to get this broadcast on the air.

Q. And you knew they were having difficulty getting money because they were pressing you to give, loan or whatever you could with money, isn't that right?

MR. CHABALEWSKI: Your Honor, that, I think, misstates the evidence. He has indicated that what he got told was they needed the money for this particular issue. He's not testified that any other information was given to him by Mrs. Ascher.

MR. FLANNERY: Your Honor, the question is not evidence. The witness will either say that's true or it's not. It's an appropriate question.

THE COURT: The Court sustains the objection. His testimony related to the

* * * *

[105] to the organization?

MR. CHABALEWSKI: Your Honor, what's the relevance? The Court has ruled repeatedly that that's not relevant.

THE COURT: The Court will permit the question and overrule the objection.

MR. CHABALEWSKI: Thank you, Your Honor.

THE COURT: Touching upon possible bias.

Q. Sir?

A. Repeat the question.

Q. Did you inform the Commonwealth that you had been making contributions to the organization up to the time that they came to see you?

A. I told them my feelings for the LaRouche writings and that I am still, you know, in contact. The people call and they tell you they're in desperate need. I mean, I still, you know, I gave some small amounts for various reasons.

Q. Now, isn't it the case that since the Commonwealth visited you or the prosecution visited you, you haven't made any contributions?

* * * *

M.T. Dooley, Direct
2/28/89
* * * *

[18] COURT: With the examination of Professor Dooley. Then I'll hear your objection, depending on what the Commonwealth's questions may elicit.

MR. FLANNERY: Thank you, Your Honor.

CONTINUATION OF DIRECT EXAMINATION

BY MR. RUSSELL:

Q. If you would, Professor Dooley, tell us what the scope of the coverage of the Virginia Securities Act is in terms of what types of instruments are designed to be included in the Virginia Securities Act?

A. Well, the Virginia definition of a security is very parallel to the Federal definition. So it is any note, bill, bond, stock are specific types of securities that are identified and covered by the Virginia statute. Then there is a general catchall phrase which would include investment contract, any other instrument commonly known as a security or option or right to buy the foregoing.

Q. How does the definition of a security in the Virginia Act compare with the definition under the Model Act?

A. They are identical except, perhaps, there is a specific exemption for the insurance securities and variable annuity policies in the Virginia Act that is not, to my [19] recollection, included in the Model Act.

Q. And you say this is also similar to the Federal Act. What is the derivation of the definition of the security found in the Federal Act?

A. The definition of a security in the Federal Act was taken in 1933 from existing state statutes. Now, when the Model Act was adopted in 1957, they copied largely the

Federal Act. So this a definition that's had both Federal, State and State again derivations.

Q. I'd like to show you now some items that are already in evidence. Directing your attention in this package specifically to what is in evidence as Commonwealth Exhibit LF-1H, LF-1T, LF-1V as in Victor, and LF-1X, LF-2J, LF-4A, LF-5A and LF-5B, LF-5A and LF5F . . .

THE COURT: Not B?

THE WITNESS: Not B.

Q. And finally LF-7B, boy, and LF-7D, David.

MR. RUSSELL: While he's examining, Your Honor, for the record, those are all copies or those are all copies from our loan files of promissory notes covering the specific counts in the Commonwealth's indictment on the promissory notes, not letters of indebtedness. And they cover the promissory notes issued by [**20**] Campaigner Publications, Inc., Caucus Distributors, Inc., Publications and General Management, Inc. and Fusion Energy Foundation.

CONTINUATION OF DIRECT EXAMINATION

BY MR. RUSSELL:

Q. Now, Professor Dooley, have you had a chance to examine those notes?

A. Yes, I have.

Q. Now based upon your expertise, your training, your knowledge of statutory and case law involving securities and the promissory notes which I have shown you, let me ask you to assume the following facts which the evidence in this case has shown. That a corporation raises money for its operations by issuing promissory notes, such as the ones before you. That various individual residents of Virginia and other states are solicited by telephone and, as a result of those solicitations, send money and receive in

return a promissory note which promises to repay that money at a time certain and with a specified interest rate.

Given those facts and assumptions, do you have an opinion as to whether those promissory notes are securities under the Virginia Securities Act?

A. I do. And my opinion is that they are.

Q. Now, sir, would your opinion . . . before I ask you the [21] next question, let me now ask you to examine Commonwealth's Exhibit LF3D, LF-6F, LF-6J, LF-6M Mary, and LF-6S Sam, and finally LF-1DD.

MR. RUSSELL: And for the record, Your Honor, those are all letters of indebtedness which are included in the counts of the indictment in this case.

CONTINUATION OF DIRECT EXAMINATION

BY MR. RUSSELL:

Q. Have you had a chance to examine those instruments, Professor Dooley?

A. Yes, I have.

Q. Having examined those, would your answer to my first question if instead of promissory notes the corporation issued those instruments?

A. But for the same purpose of raising funds for operations?

Q. Assuming all of the facts to be the same, simply the instrument instead of being a promissory note is instead a letter such as the ones I've shown you.

A. Assuming all the facts in the first question, the designation of the instrument would not change my answer.

Q. And why not?

A. Again, this is encompassed within, and commonly [22] understood to be encompassed within, the definition of a security.

Q. Now, all of the instruments that you have examined show a set rate of interest payable back to the lender. Would your answer to my first question change instead of an interest return to the lender, the loan was made at zero percent interest?

A. No, it would not.

Q. And why not?

A. Well, again, it would fit literally within the definition of note or evidence of indebtedness.

Q. If you were to assume further that the lender or investor in this case, in order to lend the money to this corporation in exchange for either a promissory note or a letter of indebtedness had to themselves borrow money from a bank or borrow the money through a cash advance on their credit card and was not expecting to recoup a rate of return greater than the interest they would have to pay, would that change your answer?

A. No, it would not.

Q. And why not?

A. Well, again, the rate of return is immaterial to the definition either of the instrument as a note or as [23] evidence of indebtedness.

Q. If some of the lenders, though they originally expected to be repaid, later agreed to forgive their loan to this corporation, would that change your opinion as to the character of these instruments?

A. Not as to the character of the instrument.

Q. And why not?

A. Well, again, the character of the instrument is determined upon the time it was issued, and it was a note when it was issued.

Now, the subsequent forgiveness of that by the lender may extinguish that person's right to collect but makes the instrument itself nonetheless a security.

Q. If you were to assume that the issuing corporation were a not for profit corporation, would that change your answer as to the character of the instrument?

A. No, it would not.

Q. If the issuing corporation were a tax exempt foundation, would that change your answer as to the character of the instrument?

A. No, it would not.

Q. And why not?

A. Well, again, the character of the instrument is [24] determined by the instrument itself. The status of the issuer is not relevant to determining what the instrument is but only what registration or other requirements may be applicable to the public issuance of those securities.

Q. Now, Professor Dooley, if you were to assume that one or more lenders solicited by this corporation believed in one or more of the goals of this corporation and in addition to expecting repayment, these lenders also intended to confer a benefit to that corporation by providing this loan and hoped by doing so to advance some political or social goal, would that change your answer as to the character of these instruments?

A. No, it would not.

Q. And why not?

A. Well, again, the nature of the instrument is determined by the instrument itself and particularly by the kinds of representations and solicitations made by the issuer is material what the purchaser of the instrument thinks he is buying.

Q. Now, Professor Dooley, if the loans evidenced by the promissory notes and the letters, such as those you have before you, were for periods of eight months or less, would that change your opinion as to the character of these [25] instruments?

A. It would not.

Q. And why not?

A. Well, again, the maturity date of the instrument is immaterial to its definition as an outer evidence of indebtedness.

Q. Next, Professor Dooley, assume that the lender in this particular case was an undercover police officer who did not expect to receive eventual repayment, would that change the character or change your answer as to the character of the instrument?

A. No, it would not.

Q. And why not, sir?

A. Well, again, as I stated several answers ago, the expectations of the individual investor do nothing to change the nature or character of the instrument itself.

Q. Now, leaving this area, Professor Dooley, let me ask you another question. Assume, if you would, that a corporation wishes to raise money for its operations through the issuance of promissory notes, such as those before you, and intends to solicit Virginia residents over the telephone by a group of solicitors located in Baltimore, Maryland, what is that corporation and that those involved in the [26] solicitation required to do pursuant to the Virginia Securities Act?

A. First of all, securities can be offered and sold in Virginia only through either a registered broker/dealer or through someone who is registered as an agent of an issuer. In a hypothetical as you have stated it, those out-

of-state solicitors would be required to register as agents under the Virginia statute, assuming they were working for one corporation.

The securities themselves would have to be registered pursuant to qualification under the Virginia statute which would involve filing an application for registration, together with the various prospectus which would then have to be declared effective by the State Corporation Commission after examination. And when it became effective and the securities became eligible for sale, they could not be sold except by delivering a copy of the prospectus that had been approved by the SCC to each individual purchaser before that purchaser could be bound.

Q. Now, you say that the solicitors in the hypothetical question from Baltimore would have to be registered. What would be required of a solicitor in order to register?

[27] A. Well, in general, in order to be registered as an agent or broker/dealer in the State of Virginia, one must take and pass an examination designed to test your knowledge about the securities laws, payment of the fee. Occasionally, also a bond will be required.

Q. What type of bond would be required?

A. A bond in an amount to cover defalcations general brokers buying the bond.

Q. And in order for the corporation to register the instruments as securities, what would be involved in that?

A. Well, they would have to file an application, pay a registration fee. They would have to submit to the State Corporation Commission as part of a registration statement a prospectus describing the business, the offering, and the rest. That prospectus would have to include financial statements. In addition to that, various exhibits would be required to be filed, including copies of the issuers Articles of Incorporation, By-Laws, specimen secu-

rity, opinion of counsel as to the legality of the instrument being registered, and such other information as the Commission might, in the course of its investigation, deem to be necessary or appropriate to be revealed.

Q. Now, sir, you also said that in order to comply [28] with the Virginia Securities Act a prospectus would have to be sent to each and every lender. In that prospectus, what would be required?

A. Well, the prospectus under the Virginia Act is very much like the prospectus that is required under the Securities Act of 1933. And that is to say that in addition to including a financial statement is really a narrative description of the business and of the particular offering. For example, you would have to disclose in the prospectus who the principal officers and directors of the issuer were, what their background was. You would have to describe the properties owned by the business. You would have to describe the nature of the business and both as it has been conducted and as the issuer proposes to engage in it.

Insofar as the offering itself is concerned, you would have to disclose the total number of shares or notes, principal amount of notes, that you were offering to the public, the total amount you expected to raise as a result of this offering, what use those proceeds would be put to. And, in general, you would have to disclose any other fact that would have a material effect on the value of the security or would be of interest to investors. That would include such things as pending material litigation. It would [29] include contractual disputes if there were any with important customers or suppliers. Or in general, again, anything that would be material to the value of the security.

Q. If an issuing corporation had, prior to this offering, lenders which had not been repaid on previously issued notes, would that be required to be disclosed?

A. Surely.

Q. If the issuing corporation was having difficulty in making its day-to-day payment of rent and utilities, would that be a fact required to be disclosed?

A. Yes, it would.

Q. Professor Dooley, assume that an individual located in Baltimore, Maryland, is a consultant for Company A and solicits by telephone a Virginia resident to provide money in return for a promissory note issued under the name of Corporation A, which is itself headquartered in Leesburg, Virginia, who and what, if anything, would be required to be registered under the Virginia Securities Act?

A. Well, the securities of the corporation would be required to be registered. The individual who made the solicitation would also be required to be registered as an agent of the issuer in this particular instance.

Q. What if Corporation A, instead of being [30] headquartered in Leesburg, Virginia, was a New York corporation, however authorized to do business in Virginia, would that change your answer?

A. No, it would not.

Q. What if Corporation A is a New York corporation which is not authorized to do business in Virginia pursuant to the State Corporation Commission, would that change your answer?

A. No, it would not.

Q. What if, instead of being located in Baltimore, Maryland, the solicitor in question was located in Virginia, would that change your answer?

A. It certainly would not, no.

Q. What if, instead of soliciting only for the promissory notes of Corporation A, the individual solicitor was also soliciting for promissory notes issued by one or more ad-

ditional affiliated corporations, would that change your answer?

A. It would likely change my answer with regard to the registration required of the individual who is doing the selling. In my judgment, under those circumstances, the individual would be required to register as a broker/dealer.

Q. If the lender in this hypothetical question were a

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[48] example, the statute speaks about . . . the Commonwealth, in our opinion, has to prove that the context requires that these instruments be securities, that is the preparatory language of the statute, and it has to prove that none of the exemptions apply, because otherwise we have the burden of proof in this case.

And that burden can be met in a variety of ways, but not by bringing another Judge in this Courtroom and usurping this Court's role and the fact finder's role and telling them what conclusions they should draw. I don't know what instruction you could give a jury after Professor Dooley finished as to what it meant, what the Court said, or what their role was as to an element of the offense. And so I don't think any of it is admissible, and particularly as he has been qualified as a lawyer, and only as a lawyer, and as an individual who has read the statute. That the Court can do and that we can argue with the Court.

Thank you, Your Honor.

THE COURT: The Court points out to counsel that a security is defined by Code Section 13.1-501J. The procedures for registration of securities are set out in 13.1-508, 509 and 510, which deal with respectfully notification . . . or registration by notification, registration [49] by coordination and registration by qualification.

To permit the witness to testify as to what a security is when we have the plain definition of the Code and to permit the witness to testify as to the procedures for the registration of those securities, and also I neglected to say that the procedures for the registration of a dealer/broker, which is set out in Code Section 13.1-505, I believe, would

invade the providence of the Court and the jury on these matters.

It's the duty of the Court to instruct the jury on the law. It's further the view of the Court that to permit the witness to testify on several hypotheticals as they would pertain to telephone calls from without the state and the various other questions put regarding the location of the corporations and whether they are domesticated in Virginia or not, it would be to look to the ultimate fact and the issue. So the Court will not permit the testimony of this witness.

MR. RUSSELL: Very well. The record will have our proffer of that testimony.

THE COURT: Your proffer and your objection to the adverse ruling of the Court as well in the event of a cross-appeal.

Would you like to inform Professor Dooley that we

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E.G. Allen, Direct
3/6/89
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[90] questions, Your Honor. Thank you.

THE COURT: On redirect?

MR. RUSSELL: No questions,

Your Honor.

THE COURT: May the witness go?

MR. RUSSELL: Yes, she may.

THE COURT: Thank you very much for being here, you're free to go. Do not, however, discuss your testimony with anyone until the case is over.

A. Thank you, sir.

THE COURT: Call your next witness.

EDWARD G. ALLEN, having been duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. RUSSELL:

Q. Would you state your name, please, and spell your last name for the court reporter?

A. My name is Edward G. Allen, and it's A-L-L-E-N.

Q. And where do you live, Mr. Allen?

A. I live in Clifton Forge, Virginia.

Q. And what do you do in Clifton Forge?

[91] A. I'm a physician, I'm a radiologist.

Q. And how long have you been in Clifton Forge?

A. Oh, since January of 1970.

Q. Directing your attention to now, sir, to spring of 1983. Did you have occasion to be in the Atlanta Airport during that time period?

A. That's right, I was attending a medical meeting there.

Q. And did anything unusual happen to you in that airport?

A. Well, either while I was there or else while I was leaving, there was a booth outside the terminal portion of the airport. And the booth had magazines and such concerning fusion energy.

Q. And did you stop at this booth?

A. Yes, I did.

Q. What attracted you to it, do you recall?

A. Well, I'm a radiologist by profession and fusion energy is related to nuclear power and such and so it was my scientific interest that prompted me to stop and pick up one of their magazines.

Q. And what, if anything, did you do after you picked up one of the magazines? Did you subscribe to [92] anything?

A. Not at that time, no. Later on I did subscribe to *Fusion Energy*.

Q. Now, prior to the time you stopped at this booth, were you familiar with Lyndon LaRouche?

A. No.

Q. At the time you picked up the magazine were you aware of any connection between Mr. LaRouche and this magazine?

A. No.

Q. Now, as a result of that, later or after this contact in the airport, did you ever receive any phone calls from Rochelle Ascher?

A. Yes, I did.

Q. And how long after your experience in the airport did you receive the first telephone call from her?

A. I would say within a month or two.

Q. And do recall during that first conversation, how she introduced herself?

A. Well, she . . . I think I was sent a subscription . . . or not a subscription, an issue of the *Intelligence Executive Review*, which is a publication of theirs. And after I had read it and then she called and [**93**] asked if I was interested in subscribing to it and I said I was.

Q. And did you subscribe to that then?

A. Yes.

Q. And during the spring of 19 . . . you said this was within a month after your airport, so it would still be in the spring or early summer of 1983, is that correct?

A. That's correct.

Q. Now, over the next year . . . strike that.

Did you have any additional conversations with Mrs. Ascher after the one in which you agreed to subscribe to *EIR*?

A. Yes. She would call and ask whether I was interested in the magazine and told me about the organization and asked if I wanted to, you know, make contributions.

Q. And did you agree to make any contributions at that time?

A. My contributions at that time were to Fusion Energy Foundation and to *Executive Intelligence Review*.

Q. In addition to contributions, did you have any other discussions with Mrs. Ascher involving money?

A. At one time it was brought up, the fact that I [94] had pension fund money available. And she stated that . . .

Q. What specifically did you say regarding your pension fund?

A. Well, at that time, the money was invested in money market funds and she stated that if I wanted to I could invest money in Campaigner Publications and receive sort of bonds and promissory notes at 12 percent interest as an investment.

Q. And . . .

A. Separate from my contributions.

Q. And did you agree to make any such investments?

A. Yes, I did.

Q. Do you recall when the first one was?

A. The first one was May of '83. It was a 10 year note for $20,000 due on 4/26/93.

Q. Now, you were referring to some notes. Are those notes that you have made?

A. Yes, this is a record of the information that the bank has, Sovran Bank has concerning the notes that they received.

Q. I direct your attention to what's marked as Commonwealth's Exhibit W1A and ask you if you can identify that?

[95] (WHEREUPON, Commonwealth Exhibit #W1A, previously marked for identification, was referred to.)

A. Yes, this is a copy of the note that was sent to First and Merchants Bank.

Q. First and Merchants Bank later changed it's name . . .

A. Changed its name to Sovran Bank.

Q. And is that the bank where you had your pension fund?

A. That's correct.

Q. Now, you said that's a copy. Do you know where the original of that note is?

A. In October of last year the bank decided, on the basis of their records, that these notes were not collectable and they mailed all the notes back to me . . .

MR. FLANNERY: Objection, Your Honor.

THE COURT: I'll sustain and direct the jury to disregard. The question is where are they, Doctor.

A. Well, the notes were sent to me from the bank at the time that the bank defaulted . . . or took the notes off their records. And then I destroyed the notes at that time because I had no further need for them.

[96] Q. Do you recognize W1A as a copy of that first note?

A. That's correct.

Q. And how long . . . strike that.

In addition to this note in late April of '83, did you make any additional loans from your pension fund?

A. There were four other . . . five other additional notes. On 7/25/83 for $30,000 was a 10 year note, 8/24/83 for $25,000, was a 10 years note, $25,000 note on 9/19/83. It was basically a six, seven and eight year note. And then in January of '84, a $50,000 note for five years. And January 11th of '84, a $50,000 note for five years for a total of $200,000 of long term notes.

Q. Directing your attention to what is marked as Commonwealth Exhibits W1B, C, D, E and F and ask you if you can recognize those five documents?

(WHEREUPON, Commonwealth Exhibits #W1B, #W1C, #W1D, #W1E and #W1F previously marked for identification, were referred to.)

A. I do.

Q. And what are they?

A. These are long term notes from the pension fund.

Q. Now, are those the ones about which you just testified?

[97] A. These I just . . .

Q. Pardon . . .

A. These are the notes that I just listed.

Q. And the originals of those notes, were they obtained by you and destroyed in the same fashion?

A. That's right.

Q. Now, the series of six loans that you've just testified about that came from your pension fund, who did you talk with in order to arrange these loans?

A. These were all arranged through Rochelle Ascher.

Q. Now, during the time period of these, which would be from I think you said early May of 1983 until February of '84, approximately how many telephone conversations did you have with Mrs. Ascher over this time period?

A. I would say approximately two a month.

Q. And how long would these telephone conversations last?

A. Oh, generally, a half hour, 45 minutes.

Q. And where would you receive these?

A. At the hospital where I work.

Q. Now, what specifically do you recall Mrs. Ascher saying as to the financial status of Campaigner [98] Publications and the organization to which you loaned money?

A. Well, she assured me that their private intelligence gathering organization, they had an operational budget which generally they spend all that they receive. However, that these promissory notes would be placed on the top of the agenda at the time they became due and that they would be perfectly safe at the time that they were due.

Q. Now . . .

A. That they would be their top priority for that particular month or week that they had their budget meetings as to what they were going to budget their operating budget for.

Q. Now, these were all long term notes. After this did you ever have occasion to make any additional loans?

A. There were a series of short term notes, either at 60 to 90 days. From February of '85 through June of '85 there was a series of 10 notes that added up to $80,000.

At that time the interest payments were behind on these notes and they asked if I would extend . . . or they asked me if the bank would extend a credit on these notes. [99] And the bank agreed that they would extend the credit if the interest payments were paid up current and a new note was issued in June of 1985, June 19, 1985, a one year note for $80,000 at 12 percent interest. In order to do that, Campaigner Publications paid a total of $10,574 in back interest payments.

Q. And how was this negotiated? How was this process negotiated?

A. Correspondence between myself and Campaigner . . .

THE COURT: Correspondence what, Doctor?

A. Between myself and Campaigner Publications directly.

Q. Now, when the interest payments on these first notes became past due, did you ever have any conversations with Mrs. Ascher about that?

A. I'm sure I did. And she referred me to members of the organization who would be responsible for the finances.

Q. And do you recall who that was?

A. In the beginning it was Wayne Hintz and later on it was Donald Phau, who was Secretary/Treasurer.

Q. Now, when precisely did you receive the interest [100] rate . . . start receiving the interest payments as a result of this negotiated process?

A. Well, all through 1985, from at least January of 1985 to June 6th . . . or June 19th, 1985, I received ten . . . or the bank received $10,574, which is the interest that was due in order to consolidate all these notes into a rollover note for $80,000.

On the long term notes, in 1985 I received $10,000 worth of interest payments on these notes, leaving a balance due of $14,000 as of December 31st, 1985.

Q. Now, do you recall when you first started receiving the interest payments?

A. Well, since the original notes were made in '83, I received interest payments in '84 that were total interest due. So, they were on schedule in 1984 and fell behind in 1985.

Q. Now, directing your attention to the beginning of 1985, did you have occasion to make any additional loans in that time period?

A. There were additional loans in February . . . beginning in February of '85. These were private loans through my own bank.

Q. And how were those loans . . . who did you talk to [101] prior to making those loans?

A. Rochelle Ascher.

Q. And was there any difference in these loans and the previous loans you had made?

A. The payment schedule was different. The person responsible . . . well, the arrangement was different. The other was notes paid by Campaigner Publications directed to the bank. These were . . . it was a line of credit. I was told that they wanted to publish the magazine, *Dope, Incorporated* . . .

Q. Who told you that?

A. Rochelle Ascher.

Q. And what did she tell you about this?

A. That this line of credit with my own bank would be used as up front money to purchase the plates to allow the production of this magazine. And out of the proceeds of the sale of the magazine, some of the profit would go to them and some of the money would go back to repaying the people who would put the money up front to provide plates for the publishing.

Q. And what, if anything, did she say as to the sales prospect of *Dope, Incorporated*?

A. That the previous . . . well, the previous [102] production run had been sold out within six months. And they would publish a new group and that this would be sold out within six months time. And that I would, some time during that time, I would receive my money.

Since these were lines of credit that became due at 15 percent interest, I would notify them when I paid the bank

the interest and they would refund the interest payment to me each time I renewed these notes for 90 days.

And they were renewed approximately four times. Toward the end I was getting concerned that there was no payment being made on the principal of these notes and the bank . . . when I told them that the bank would not keep renewing these notes unless they had some payment of principal and then I talked to Donald Phau and he said that that would . . . they would make some arrangements to repay the principal, but that never happened.

And then finally, after about four renewals which would be a total of a one year period, I decided at that time that I wasn't going to, you know, that plus the fact that these other back interest payments were accumulating, I decided to pay off the note myself and sever relationships with the organization.

Q. Now, how much total did you loan for the [103] publication of *Dope, Incorporated* in February of '85?

A. $35,000.

Q. And did you receive notes back in return for those?

A. In the beginning I did, but not necessarily with each renewal.

Q. Now, the original notes were for how long a time period?

A. They were 90 day demand notes on the First National Bank of Clifton Forge.

Q. And on the occasions when they would be renewed, would the organization ever send you additional notes to evidence the renewal?

A. They did the first time and after that they never did. I kept the first round, the originals used, but from a bookkeeping point of view they never renewed it.

I would get a note for 90 days, but I kept that as evidence that that's how the process started. But the other renewals that took place, I never did receive an additional renewal note with the new dates on it.

Q. I'm going to show you Dr. Allen, what is already in evidence as Commonwealth's Exhibit LF1WDD, FF and HH [**104**] and ask you if you'd examine those three pieces of paper, please.

A. What's your question?

Q. Do you recognize those three documents?

A. I do.

Q. And what are they?

A. They're the receipts for the lines of credit that I took out at First National Bank communicating their indebtedness to me for these amounts at 15 percent interest.

Q. And the date on those are in October and November of '85, is that correct?

A. That's correct.

Q. Now, is that one of the renewals?

A. It might be the original at the time.

Q. What are the total amounts of those three?

A. Well, $35,000.

Q. And what was the interest rate called for?

A. 15 percent.

Q. And you recognize those as representing the $35,000 you loaned for *Dope, Incorporated*?

A. That's correct.

Q. Now, going back to your conversation with Mrs. [**105**] Ascher when this publication was discussed, were you

already aware that interest payments on your earlier notes were not being made as called for?

A. Yes, that's correct, on the long term notes.

Q. And was that brought up with Mrs. Ascher at the time you agreed to make these loans, the $35,000 loan?

A. Yes.

Q. And, if you would, what did she say about that?

A. Well, there was some attempt to pay back the interest payments. I . . . at that point I was running scared and I felt that perhaps a renewal of, you know, this was a different . . .

MR. FLANNERY: Objection. This is a conversation?

Q. If you would, Dr. Allen, just simply tell us what you told Mrs. Ascher and what she said back to you regarding this loan and the fact that the interest payments on your previous loans were not paid.

MR. FLANNERY: Can we have a foundation time as well?

THE COURT: I believe he testified this was in February of 1985.

Q. Is that correct?

[106] A. That's correct.

THE COURT: He's testified to that, when he talked to the Defendant about this.

Q. Go ahead, Doctor.

A. Well, since the payment scheduling was different, this was for books that were going to be published and the proceeds . . .

MR. FLANNERY: Objection. Is this a statement that's being made or not?

Q. Is this . . .

A. This is what she told me. That this . . . these notes were for the publication of *Dope, Incorporated*, in which the proceeds would come from the sale of the books which was not related to where I was going to get proceeds from the other loans.

Q. Where did you understand the other loans, the source of repayment for the other loans would be coming from?

A. Well, it was from Campaigner Publications.

Q. Would you have, at this time, in February of '85, agreed to make loans, additional loans, to Campaigner Publications?

A. No.

[107] Q. What, if anything, did Mrs. Ascher say as to the profitability of their publishing *Dope, Incorporated* in February of '85?

A. Well, they had one publication already that was sold out and this was the second publication. And she assured me that they would only publish a certain amount that they could be assured of selling and that they would be sold within a six month period.

Q. Directing your attention now to 1986, did you have any conversations with Don Phau regarding this $35,000 loan?

A. Well, in April of '86 I had paid those notes off myself because . . .

MR. FLANNERY: Objection, unresponsive.

THE COURT: I sustain.

Q. Did you have a conversation with Mr. Phau in that time period, any time in 1986 regarding . . .

A. That's right.

Q. And when was that conversation, as best you can recall?

A. Well, let me check my records here.

Q. Are those your personal notes you're looking at?

E.G. Allen, Cross
3/6/89
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[126] correct?

A. That's correct, I was familiar with the organization.

Q. So, is it safe to say that you were fully aware of the political positions in the organization before you ever made a loan in 1983?

A. That's true. That's why I made the contributions and that's why I made the loans.

Q. Because you supported the political position . . .

A. Because I supported the political position of the organization.

Q. And by 1983, you certainly knew what those positions were.

A. That's correct.

Q. Now, isn't it a fact that you considered the interest on the loans that you made with Campaigner nominal interest? That is, that there had to be some number to satisfy the people at the bank where you had the pension fund, isn't that right?

A. That's correct.

Q. And you wanted to make these loans because you wanted to help the political agenda of the organization, isn't that correct?

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[131] at some interest or other?

A. That's . . .

MR. RUSSELL: Objection as to what Mr. Goodwin may have said.

THE COURT: Sustained.

Q. Did you understand that in order to take money out of the pension fund that it had to be done at a certain interest rate?

A. Well, I am not aware what the pension was. I told him that I wanted to lend the money to Campaigner Publications as a promissory note for a ten year period and they would pay 12 percent interest on the note. And he wired the money.

Q. Weren't you concerned that if there wasn't some interest on the note then you would lose the tax advantage of having the pension trust fund in the first place?

A. Oh, I'm sure that's true.

Q. And so, you wanted to have some interest rate and couldn't give it, that is use the pension funds without endangering its tax status, isn't that correct?

A. I'm sure that's true.

Q. Now, in 1984, didn't you have to have Mr. Goodwin inquire about where some of the notes where? You didn't have copies of all of your notes, isn't that correct?

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[141] nature of these matters.

THE COURT: I'll sustain the objection.

MR. RUSSELL: Thank you, Honor.

CONTINUATION OF CROSS EXAMINATION
BY MR. FLANNERY:

Q. Now, directing your attention to your Campaigner loan in February of '85, by February of '85 were you aware, by conversations with Mrs. Ascher, about the seizure of the monies in the First Fidelity Bank during the LaRouche Campaign?

A. Probably; it was in their magazine as well.

Q. In terms of what you were reading in the period of '83, '84 and '85, what publications did you receive from the LaRouche organization?

A. Well, *EIR* and Fusion Energy . . . well, *Fusion* magazine.

Q. Did you read the newspaper as well, *New Solidarity*?

A. No, no.

Q. So, only those two magazines, then?

A. Yes.

Q. Now, were you advised in around January of 1985 [142] that the book, *Dope, Inc.* was banned in South American countries?

MR. RUSSELL: Your Honor, I object to the relevance of what happened in South America would have to do with it.

MR. FLANNERY: On direct they went into the circumstances and knowledge of this witness when he was lending money for the publication of *Dope, Inc.*

Certainly, what's going on by way of interfering with publication or harassment about the publication . . .

THE COURT: Lay a suitable foundation then of the knowledge of this witness as to what may have been happening in South America. He's made . . .

MR. FLANNERY: I asked him if Mrs. Ascher told him.

THE COURT: . . . reference to publication of the second run of the book. And this is the purpose of the loan.

Now, confine your inquiry to that in that time frame, please.

[143] MR. RUSSELL: Thank you, Your Honor.

Q. In connection with your conversations about *Dope, Inc.*, those conversations were had with Mrs. Ascher, is that right?

A. I had conversations with Mrs. Ascher about contributing money for the publication of another run of this magazine.

Q. And did she, in words or substance, in those conversations tell you about the fact that the book had been banned in South America?

A. No, not at all. She said that the previous run had been sold out and that they were going to publish another run and, based upon past experience, they would expect that six months would go by for these books to be published, because I was renewing this note on a 90 day basis and I wanted to have some idea within that time frame as to when I would be getting paid.

Q. Is it your testimony that she never told you anything about problems with the publication of the book in South America?

A. Not that I'm aware of.

Q. Is it your testimony you didn't read anything in [144] any of the LaRouche publications, either *EIR* or any other publication, about problems with the publication of the book because of harassment . . .

A. I don't know about a problem with publication. I read that there was . . . they were upset about . . . people were upset about the publication and they were going ahead and publishing it and selling it over the objections of whoever they were hurting down there, government officials or whoever they were.

Q. And when did you read about that? Did you read about that before you made your loan for the publication of *Dope, Inc.*?

A. Well, I can't recollect that time frame.

Q. Do you recall having conversations with Mrs. Ascher in 1984 in which she told you then that the publication of *Dope, Inc.* was something that met a lot of resistance from bankers and from certain people in law enforcement and other communities?

A. I may have been told that by her and read about it in their magazine.

Q. Do you recall being informed by her that in the publication of this book in the past that there had been harassment of individuals working on the book for [145] research, as well as trying to circulate or distribute it?

A. That's true.

Q. So, you were aware of that before February of '85 when you made your loan to help the publication of this book, isn't that right?

A. Right. I was supporting the publication of the book. I wanted it to be published.

Q. Because you thought the content was important?

A. Was important, that's correct.

Q. And among the issues that you supported the LaRouche organization about was their very strong policies against narcotics distribution, is that correct?

A. That's correct.

Q. Isn't it a fact that as a result of your contributions to various political campaigns of the LaRouche organization you, yourself, have been harassed?

A. No, not that I'm aware of.

Q. Do you recall signing an affidavit in and around December of 1982 about harassment as a result of a contribution you made to the campaign of a Debra Freeman?

MR. RUSSELL: Your Honor, what relevance is a 1982 affidavit of a candidacy of Debra Freeman have to do with this?

E.G. Allen, Redirect
3/6/89
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[160] operating budget. And this was creating a problem for them.

And they had a meeting, supposedly, of the people who run the organization and the word went out that they should concentrate on contributions and not promissory notes. As these promissory became paid, they would decrease to a certain percentage of their operating budget. And that it would take time for that to get out of hand . . . to get back in line and if I was patient that I would get the funds. And I agreed then to the rollover of all the short term notes into that $80,000 one year note.

Q. And when was that conversation?

A. It would be in '85, prior to June of '85 when all of these 10 short term notes that I had were being rolled over into a single $80,000 note, if the interest payments were paid up to June 19th, 1985.

And I was buying time for the organization. They asked me if I would cooperate with them in this way and I said I would.

Q. Had you heard about this problem with the amount of promissory notes prior to this conversation in May or June?

A. No, no.

[161] Q. If you had known about that problem in February of '85, would you have made the $35,000 loan for the publication of *Dope, Incorporated*?

A. Probably not.

MR. RUSSELL: That's all, Your Honor.

THE COURT: Recross?

MR. FLANNERY: Just a couple, Your Honor.

RECROSS EXAMINATION
MR. FLANNERY:

Q. When you spoke to this gentleman, are you sure his name was Greenberg? Could it have been Cromberg?

A. I'm not sure. I think it was Greenberg.

Q. And do you recall in this conversation whether or not you didn't also speak about the Lafayette Leesburg Partnership?

A. I can't recall that conversation, no. At the end of '85, somewhere around April of '85, I talked to them about the Lafayette Leesburg Partnership and the fact that they were obligated to pay interest since that 90 day/120 day period had gone by and they hadn't formed the partnership. And I did receive some interest payments at that time.

E.L. Parker, Direct
3/8/89
* * * *

[4] case . . . well, never mind. It's the same lineup, no change.

MR. FLANNERY: No, it is a change. I didn't bring any of my material because I was told there would only be two witnesses.

MR. CHABALEWSKI: I talked to Mr. Flannery yesterday, Your Honor, and I was under the impression that we would go with those witnesses that we have from out of town.

THE COURT: All right. You've indicated they might take the whole day but, on the other hand, if there was another witness local in waiting and . . . let's see what evolves here.

MR. CHABALEWSKI: Very well, Your Honor.

(WHEREUPON, the jury entered the courtroom.

EUGENE L. PARKER, having been duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. CHABALEWSKI:

Q. Would you please tell us what your name is, sir?

A. Eugene L. Parker

Q. Mr. Parker, where do you live?

A. In Puerto Rico.

[5] Q. And what do you do in Puerto Rico for a living?

A. I work for the Federal Aviation Administration.

Q. And how long have you worked for them?

A. 30 years.

Q. Mr. Parker, I'd like to call your attention, if I could, to June of 1985. Did you have occasion to be in Washington National Airport at that time?

A. Yes, I did.

Q. And did anything unusual occur at that time?

A. While I was in the terminal I noticed that there was a woman with a group of people around her that were discussing . . . or she was talking about some things that I was quite interested in, namely the Strategic Defense Initiative and drug interdiction. And she was selling subscriptions to the *EIR* magazine.

Q. Did you go over to that group?

A. Yes, I did.

Q. Did you have a conversation with that individual at that time?

A. Yes, I spoke with her for a few moments and listened to what she had to say. She showed me some older copies of the magazine, you know, to indicate what types of articles were contained in the magazine.

[6] Q. Did you purchase a subscription to anything at that point in time?

A. Yes, it was a limited subscription; I think, something like three months for about $65.

Q. And as a result of getting that subscription, how did you pay for that subscription, do you remember?

A. I paid cash.

Q. And as a result of paying cash did you receive anything as a receipt for that cash?

A. Yes, I got a receipt for it.

Q. Mr. Parker, I'd like you to take a look at what has been marked as W23G. Take a look at that piece of paper; what is that?

(WHEREUPON, Commonwealth Exhibit W23G, previously marked for identification, was referred to.)

A. This is the receipt for the publication . . . or the subscription to the *EIR* magazine.

Q. And other than the sticker that has the exhibit number and the initials in blue ink at the bottom, is that document in substantially the same condition as when you received it in the airport?

A. That's correct.

Q. I'd like to call your attention, if I could, to approximately one week later; did you receive a phone [7] call?

A. Yes. It was just a few days after I got back to Puerto Rico.

Q. And the individual that called you, was it a man or a woman?

A. It was a woman.

Q. Did she identify herself?

A. Yes, she did.

Q. And how did she identify herself?

A. She told me that her name was Rochelle Ascher and that she was with the, quote, LaRouche organization.

Q. And did she tell you where she was calling from?

A. Baltimore.

Q. Did she indicate to you any connection between the incident in the airport and what she was doing?

A. Yes, she mentioned that she had gotten my name and telephone number as a result of my filling out the form for the subscription.

Q. Now, generally, without going into any specifics, what was the substance of the conversation you had with Rochelle Ascher at that point in time?

A. It started off wanting me to extend my subscription to the *EIR* and later on got into a lot more [8] things. She was talking a lot about some of the items that I mentioned before that attracted my attention to the publication having to do with the SDI and the drug interdiction programs.

Q. Did the subject of money come up in this conversation?

A. Yes, it did.

Q. And in what way?

A. She was telling me that the LaRouche organization had need for contributors because of various political efforts that they were putting forward in support of SDI and also to support their publications, gift subscriptions of the publications to the various and sundry political and influential people.

Q. Did you agree to give any money to her?

A. No, I told her at the time that I was not in a position to make a commitment to make any gifts.

Q. Did she say anything to you at that point?

A. Yes. She said, you know, if I couldn't make a gift that there was another way that I could help support the organization. So I asked her, how was that? And she explained to me that they needed, first of all monies, like I said, to provide subscriptions, gift subscriptions [9] of various publications and also they needed travel money for a large number of people that they were trying to convene in the Washington area for a very important conference. And that if I had substantial limits on my credit cards, that they could utilize the credit cards.

Q. How did she explain to you that these credit cards could be utilized?

A. Well, that by my authorization that these expenses could be charged to my credit cards.

Q. And as a result of the conversation that you had with her that day, did you agree to allow her to utilize your credit card?

A. Yes, I did, with some very strong conditions or stipulations. And that was that they agreed to pay me an amount monthly equivalent to whatever it was going to cost me to make the payments on the credit cards.

Q. Now, let me ask you this: the arrangement that you came to with Rochelle Ascher, were you going to make a profit, yourself, in terms of lending the money to them?

A. No, absolutely not.

Q. Was your intention to merely provide them the money at no gain to you?

A. That's correct.

* * * *

R.A. Hiatt, Direct
3/9/89
* * * *

[**Page 74**] (WHEREUPON, the jury entered the Courtroom.)

ROBERT A. HIATT, after having been duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. RUSSELL:

Q. Would you tell us your name, sir, and spell your last name for the court reporter.

A. Robert A. Hiatt, H-I-A-T-T.

Q. And where do you live, Mr. Hiatt?

A. De Land, Florida.

Q. And what do you do in De Land, Florida?

A. I'm a physician and medical radiologist.

Q. And how long have you lived in Florida?

A. Twenty-nine years.

Q. Now, sir, directing your attention to December 1, 1983, did you have occasion to be in Chicago O'Hara Airport?

A. Yes, I was. I attended a medical meeting there.

Q. And did anything unusual happen to you in that airport on that day?

A. Some people approached me with literature and soliciting a contribution for the Fusion Foundation.

Q. And did you go over to those people and talk with them?

A. Briefly.

[**75**] Q. And did you give them any money at that time?

A. I think I gave them $10.

Q. And did you get any literature in return?

A. Yes. Later in the mail, I did receive literature.

Q. At the time you gave the $10, did you have to fill out any forms or give them any information?

A. I think I gave them my name and address.

Q. Now, after this December 1 encounter in Chicago at O'Hare Airport, did you have occasion to talk to anyone on the telephone as a result of that?

A. Yes. I received periodic calls.

Q. And when was the first telephone call you received?

A. I think it was early in 1984.

Q. And who called you on that occasion?

A. Rochelle Ascher.

Q. And how did she introduce herself?

A. Well, she mentioned she was a member of the LaRouche organization and talked about various political items. I think she tried to get me to subscribe to some of the publications that they produce.

Q. Did she say where she was calling you from?

A. Yes, I think it was from Baltimore.

Q. And did you agree to take any subscriptions at that [76] time?

A. I think I did subscribe to the Fusion Foundation literature.

Q. And in addition to that subscription, did the subject of . . . was money discussed in any other fashion with Mrs. Ascher on this occasion?

A. She was seeking donations to the organization.

Q. And did you agree to make any donations?

A. I made small donations from time to time.

Q. Now, when you say small donations, what types of dollar amounts are you talking about?

A. $100.

Q. And did you have any additional conversations with her after this one in early January?

A. Yes. She called periodically.

Q. And about during this time period, how often would she call you?

A. Oh, perhaps once a month.

Q. Now, in any of these conversations in January of 1984, was money discussed in any fashion other than magazine subscriptions and contributions?

A. Well, as they got into the . . . as the presidential campaign came up, they were seeking contributions for the [77] LaRouche campaign.

Q. Now, directing your attention to, again, January of 1984, did you have occasion to make any loans?

A. Yes, I did make loans during 1984 from time to time.

Q. And when you would make a loan, would you receive anything back in the mail?

A. I received notes.

Q. Directing your attention to what is marked for identification as Commonwealth's Exhibit W-15A, do you recognize that document?

(WHEREUPON, the document referred to was marked Commonwealth's Exhibit #W15-A for identification.)

A. Yes.

Q. And what is that?

A. This is one of the promissory notes that I received after agreeing to loan money.

Q. And this loan, when did you make this loan?

A. This particular one was in January, '84.

Q. And was that after your conversation with who?

A. Primarily with Rochelle Ascher.

Q. And how much did you loan on this occasion?

A. $1,000.

Q. And what was the interest rate?

[78] A. It's stated as 12 percent.

Q. And what was the term of the loan, when were you to get repayment?

A. In two years.

Q. Now, during your conversation with Mrs. Ascher prior to making this loan, how was the interest rate of 12 percent arrived at?

A. Well, she offered it as an inducement to make a loan.

Q. And at that time in January of '84, how did 12 percent interest compare with other places you had your money?

A. Well, it was much higher.

Q. What, if anything, did Mrs. Ascher say as to the degree of risk in making this loan?

A. Well, she said there would be no problem for they're paying back these loans out of their cash flow, as soon as they collected so much money every month.

Q. And did she draw any . . . say anything else as to the degree of risk?

A. Nothing further that I can recall.

Q. Now, after this loan in January of 1984, did you receive any additional telephone calls from Rochelle Ascher?

[79] A. Yes. I received several during the year, also from Fred Haight, soliciting more funds for the campaign.

Q. Now, you say you also received calls from Fred Haight. What, if anything, did Mr. Haight say as to his relationship with Mrs. Ascher?

A. Well, nothing other than they were in the same organization with the same objectives.

Q. Did Mr. Haight tell you where he was calling from?

A. I think he said he was calling from Baltimore, too.

Q. Now, in addition to this $1,000 in January of 1984, did you agree to make any additional loans?

A. Yes. I made a series of loans. The last of them was in August of '84.

Q. Directing your attention to what is marked for identification as Commonwealth Exhibit W-15I and W-15G, do you recognize those documents?

(WHEREUPON, the documents referred to were marked Commonwealth's Exhibits #W15-J for identification.)

A. Yes, these two are notes for sums of money I agreed to loan through my credit cards.

Q. And when did you agree to make those loans?

A. Well, $1,000 in June of '84; a second $1,500 loan in the same month.

Q. And to what organization did you make those loans, [80] to what companies?

A. Well, some were made to Campaigner Publications, some were Fusion Energy.

Q. And what were the terms of those loans? What interest rates were they paying?

A. They're both at 12 percent for one year.

Q. And who did you talk to prior to making those loans?

A. Rochelle Ascher and Fred Haight at times.

Q. Now, how did you . . . how would you get the money for these loans to Mrs. Ascher?

A. I gave them two credit card numbers that I used and they charged the credit cards.

Q. And at whose suggestion was that?

A. I don't recall for sure.

Q. Did you suggest the use of the credit card?

A. I agreed to use them, but I don't remember whether it was my suggestion or hers.

Q. When you made these loans, was there ever any deadline for the receipt of the money expressed to you by Mrs. Ascher?

A. Well, they were always in a hurry to get it.

Q. Now, directing your attention to August of 1984,

* * * *

[95] that correct?

A. Mildly.

Q. It's embarrassing to you personally and professionally, isn't it, that people now know that you supported LaRouche?

MR. FLANNERY: Objection, Your Honor. It's argumentative and irrelevant.

THE COURT: I sustain.

MR. FLANNERY: It goes to bias, Your Honor.

THE COURT: I sustain.

Q. In addition, you attended political meetings in Orlando, Florida, isn't that correct, sir?

A. One, yes.

Q. And the thrust of that meeting was about political issues, isn't that correct?

A. That's right.

Q. And did Mr. Haight invite you to that meeting?

A. I think he did, but I don't recall specifically which person invited me.

Q. Wasn't that meeting in early December of 1982, sir?

A. No, I think it was in '83 or '84. I don't remember the date.

[96] Q. Do you recall what month it was in '83 or '84?

A. I'm sorry no. It was the local branch . . .

Q. When you say it was . . . I'm sorry, I didn't mean to cut you off. You say it was the local branch of the LaRouche organization?

A. Yes, yes.

Q. And what was the general topic of discussion at the meeting?

A. They were trying to get people to run for office under the organization's auspices.

Q. Were you thinking of running for office, sir?

A. No, I declined.

Q. You were asked, though, weren't you?

A. Yes.

Q. And you considered it, didn't you?

A. Very briefly.

Q. But your wife was opposed to it, isn't that right?

A. Yes.

Q. Excuse me?

A. She was opposed to the entire organization

Q. Now, does reference to that meeting in Orlando refresh your recollection that you were speaking to Mr. Haight before you spoke to Mrs. Ascher?

* * * *

[98] A. My pension fund has nothing to do with any of the loans I made.

Q. Did you make your loans charging on a credit card?

A. Yes.

Q. Did you carry the loans on a credit card?

A. For as short a period as I could, yes.

Q. And approximately what were the carrying charges on your credit cards?

A. Twelve, 15, 18 percent.

Q. And for about how long did you carry the charges on your credit card?

A. Two or three months.

Q. Was it your understanding that the organization primarily received its funds as a result of contributions because people like yourself supported its political positions?

A. I assumed that was the case.

Q. When you were discussing W-15A, your loan in January of '84 for $1,000, you said that you made that loan as a result "primarily of your conversation with Rochelle Ascher". Did you mean that you had conversations with others before you made that loan when you said primarily?

A. Most of the conversations were with Rochelle Ascher.

* * * *

[102] Q. And you'd never seen their newspapers or magazines sold in any newsstands, did you?

A. No.

Q. And you never saw it advertised in any major publication like *Time* or *Newsweek* or the other weeklies or newspapers that you read, did you?

A. No.

Q. And you understood that the organization was basically a third party movement, that it was not yet popular, is that correct?

A. I understand that that was one of their major objectives, yes.

Q. To become a political force in the country, isn't that right?

A. Yes.

Q. And you read *New Solidarity* through 1984 and, therefore, were apprised of their efforts to get Mr. LaRouche on T.V. as many times as they could?

A. They told me about that. That was their prime objective to get him on T.V.

Q. And, in fact, when you made your loan, you expected that was going to help put him on T.V. so he could espouse the views you supported, isn't that right?

[103] A. Yes.

Q. Now, some of the loans that you made you did make at zero percent interest, isn't that correct?

A. The note in August for three months.

Q. And this was because you supported the political principles of this organization, isn't that right?

A. Only in part.

Q. Well, the part that you supported of their principles, perhaps, not all of them but the ones that were important enough to you was the impetus for you to make the loans in the first place, isn't that right?

A. Actually, there was more in the nature of attacking the other Democratic candidate rather than promoting this one.

Q. Okay. But the bottom line, it was a political view, isn't that right?

A. Well, yes.

Q. Now, during 1984, didn't you become aware of problems with the bank accounts with First Fidelity Bank and Boston Bank as a result of reading *New Solidarity*, which you were reading and talking to Mrs. Ascher?

MR. RUSSELL: Your Honor, I'm going to object unless a time frame is put on that.

A. Cotterino, Direct
3/10/89
* * * *

[150] ANTHONY COTTERINO having been duly sworn by the Clerk was examined and testified as follows:

DIRECT EXAMINATION
BY MR. RUSSELL:

Q. Good afternoon, sir. Would you tell us your name, please and spell your last name for the court reporter?

A. My name is Anthony Cotterino, C-o-t-t-e-r-i-n-o.

Q. And where do you live, Mr. Cotterino?

A. 21 Deep Drive, Timonium, Maryland.

Q. And what do you do for a living?

A. I'm retired.

Q. What are you retired from, sir?

A. I was an accountant/office manager at a construction company.

Q. And how long have you lived in Timonium Maryland?

A. 27 years.

Q. Mr. Cotterino, is the Lutherville Post Office near your home?

A. Yes, about a ten minute drive.

Q. And did you ever have occasion to have contact with an organization at the Lutherville Post Office?

A. Yes, sir.

[151] Q. And if you would, tell us when that happened.

A. It was back in '84 or . . . 1984.

Q. And what happened during that contact?

A. Well, they stopped . . . they wanted me to take a subscription to a newspaper for $25.

Q. And what newspaper was that, do you recall?

A. No, there have been three or four since then. I don't recall the name of it.

Q. Did you agree to make a subscription?

A. Yes, sir, for $25.

Q. And what particularly attracted you to this display?

A. Well, they claimed that they were going to do a lot of good for this country.

Q. And after taking out this subscription, did you have occasion to receive any telephone calls?

A. Later, yes, sir.

Q. And when was the first telephone call you received after that?

A. It was about May of 1984.

Q. And did the person making the call identify themselves?

A. Yes, she said her name was Rochelle Ascher.

[152] Q. And what, if anything, did she say linking herself to the display or the subscription that you made at the post office?

A. Well, she was talking about all the good they were going to do, about how all the banks were going to all go under and about all of these people being associated with drugs and all that, they were going to wipe that all out. They were going to take care of everything.

Q. And how long did this first telephone conversation last?

A. I guess about 10, 15 minutes.

Q. And did the subject of money come up during that first conversation?

A. No.

Q. After that first call, did you receive any additional phone calls from Mrs. Ascher?

A. Yes, sir.

Q. And when was the next call that you received?

A. About the 4th of June.

Q. And how long was this telephone conversation?

A. Well, I guess it was 15 or 20 minutes.

Q. And did the subject of money come up in this [153] telephone conversation?

A. Yes, sir.

Q. And how did that subject come up?

A. Well, they needed money to continue doing the good they were doing, so she talked me into giving $5,000.

Q. Did you do that as a contribution?

A. No, sir. She told me that she was going to pay me 12 percent interest on my money.

Q. Now, did Mrs. Ascher ask you to make a contribution?

A. Yes.

Q. During this telephone conversation?

A. Yes, sir.

Q. And what did you tell her when she asked you to make a contribution?

A. Well, at the time, I told her I was going to do it, but of course, I was earning 17 percent interest on the

money and she was only going to pay me 12, so actually, it wasn't for any financial benefit.

Q. Now, let me back up just a minute. You're talking about paying interest. Did she ask you to just give the money first?

A. No, she told me she was going to pay me 12 [154] percent interest on this money.

Q. Did she bring up the subject of paying interest?

A. Yes, sir.

Q. And what did she tell you, if anything, about repayment?

A. She told me that it would be for one year, that it would be repaid in one year.

Q. And what, if anything, did she tell you about the degree of risk in this loan?

A. She said there wasn't no risk.

Q. What, if anything, did she say about other people who had loaned money in the past?

A. Well, she said they had quite a few contributors.

Q. Did you agree to make this $5,000 loan?

A. Yes, sir.

Q. And . . .

A. With the understanding, of course, that I would be repaid in one year.

Q. And how did you make the loan?

A. Well, it was through credit cards.

Q. And who suggested the use of your credit cards?

A. Rochelle.

[155] Q. Was the whole $5,000 on a credit card?

A. All but $500. I wrote a check for $500.

Q. And what did you do with the check for $500 after you wrote it?

A. I put it in the mailbox and someone picked it up.

Q. And how was that arrangement made?

A. Over the phone with Rochelle Ascher.

Q. After you made the loan, did you receive anything in return in the mail?

A. No. Up to this date, I have received nothing.

Q. I'm not talking about repayment. I'm asking did you receive any evidence of your loan?

A. Yes, yes.

(WHEREUPON, Commonwealth's Exhibit #W9A previously marked for identification was referred to.)

Q. I show you what is marked for identification as Commonwealth Exhibit W9A and ask you if you can identify that.

A. That's it, sir.

Q. And have you ever seen that before?

A. Yes, sir.

Q. And what is that?

A. That's a note, her promise to pay me the $5,000 [156] plus 12 percent interest in one year.

Q. And is that what you received in the mail?

A. Yes, sir.

Q. Now, other than the sticker and the initials on the bottom, is that in substantially the same condition as when you first received it?

A. It most certainly is.

Q. Now, what credit card did you use to make the $4,500 of the $5,000 loan?

A. Master Card and Visa.

Q. You used both of them?

A. Yes, because my cards only had a $2,500 limit.

Q. Did you tell Mrs. Ascher the limit?

A. She knew it. She found it out.

(WHEREUPON, Commonwealth's Exhibit #LF9C previously marked for identification was referred to.)

Q. I show you what is marked as Commonwealth Exhibit LF9C and ask you if you recognize the numbers on those.

A. Yes, sir.

Q. What do you recognize the numbers as?

A. It's $2,500.

Q. Do you recognize the credit card numbers?

A. Yes, that's the Visa.

* * * *

[158] Q. Now, after this June 4th, 1984 transaction, did you have occasion to talk to Mrs. Ascher again?

A. About two weeks later she called again.

Q. And what did she say in this telephone conversation?

A. This time she said that they needed more money because they were going to pour concrete.

Q. Did she indicate where they were going to pour concrete?

A. No. Someplace here in Leesburg and she talked me into making a loan at the bank for $25,000.

Q. And what, specifically, did she say to you about making a loan at the bank?

A. Well, she told me that, over a period of three years, she would repay it. Whatever it cost me at the bank is what she was going to pay me. I got an interest rate at 13.4 percent and it was supposed to be paid in 36 equal payments.

Q. Now, who suggested to you going to the bank and taking out a loan?

A. She did.

Q. And how did that first come up?

A. Well, I forgot and she thought I had it and I [159] told her I didn't have it and if she got the money, I would have to go to the bank for it and of course, she agreed.

Q. And how much did she ask you to take out in a loan at the bank?

A. Well, it was . . . she thought perhaps maybe $50,000, but I told her I wasn't going to go for $50,000, so I went for the $25,000.

Q. And did you, in fact, go to the bank and take out a loan?

A. I most certainly did.

Q. And what did you do after you took out the loan?

A. Well, I told her what the payments were going to be and she promised that I would be getting a check every month so I could pay the bank.

Q. And did you transmit any money for this loan?

A. Yes, I wrote a check and she personally picked it up, for $25,000.

Q. And where did she pick up the check?

A. At my house.

Q. And did you receive anything in the mail . . .

A. Yes, sir.

Q. . . . after you made that loan?

A. Cotterino, Cross
3/10/89
* * * *

[187] A. I made no contributions.

Q. I'm sorry?

A. I made no contributions. I said I bought a publication for $25.

Q. Did you make any contributions to the . . .

A. None whatsoever.

Q. Not even in the presidential election?

A. In the presidential election, there was $1,000 charged on my credit cards and I was informed of it after it was done.

Q. You're saying you made a $1,000 contribution . . .

A. I didn't make a contribution. I said there was $1,000, $500 charged on each of those credit cards and after it was done, I was notified that it was put on my credit cards. Then they sent me a note telling me that I had—about this contribution and I was going to be repaid for it.

Q. And it's your testimony that you didn't know about it until after the fact?

A. Until after the fact.

Q. You began supporting this organization when you first met individuals at a post office, is that your testimony?

[188] A. That's right.

Q. And you contributed $25 for a newspaper, subscribed to a newspaper?

A. That's right and that's the only contribution I made.

Q. And you continued to receive that newspaper, is that correct?

A. Yes.

Q. And you received it throughout 1984, is that correct?

A. Yes.

Q. And you continued to receive that newspaper and you read that newspaper, right?

A. I didn't read it, no.

Q. You didn't read it?

A. I read the first couple and it didn't do anything for me, so I just didn't bother reading it anymore.

Q. Did you watch the television broadcasts of Mr. LaRouche?

A. No, I didn't.

Q. You knew about them, though?

A. Oh, yes, I was informed. I had five or six, [189] maybe seven phone calls come in.

Q. And it's your testimony that you didn't watch the TV broadcasts at all?

A. No, I did not.

Q. And you didn't discuss those broadcasts, therefore, with Mrs. Ascher, is that your testimony?

A. That's right.

Q. Now, when you subscribed to this magazine, you subscribed in part because you believed that they were trying to save the world? Isn't that your testimony?

A. That's what they told me, yes.

Q. And you believed it?

A. Well, I believed it until I read the first couple of publications.

Q. And when did you read the first couple of publications?

A. When I first got them.

Q. When did you read them? When? What month and what year?

A. I don't know.

Q. Well, how long was it after you first met them at the post office, sir?

A. It might have been a month.

[190] Q. And when did you meet them at the post office?

A. Probably in the spring of '84.

Q. Around March?

A. Probably.

Q. And after you read their publications and disagreed with them, then you made a loan for $5,000?

A. Yes.

Q. Even though you disagreed with them?

A. Well, yes.

Q. Excuse me? Yes?

A. Yes.

Q. And after you made a loan for $5,000 with a group you disagreed with, then you took a mortgage on your house, at no benefit to yourself, for $25,000, is that right?

A. I did it because the woman said she was going to pay it back.

Q. Isn't it correct that you were going to be paid back exactly the same amount that you had to go through the trouble to get a loan for?

A. No.

Q. No?

A. No, because the first one . . .

[191] Q. You were . . . I'm sorry?

A. The money that was loaned through the credit cards, I was paying 17.7 percent interest and she promised to give me 12 percent.

Q. Okay, so let's go back to this. The organization you didn't support on June 4th, 1984 that you were going to make a $5,000 loan to at 12 percent . . .

A. Yes.

Q . . . you were going to go and take money from your credit cards, costing you more than the interest you were going to get, to loan money to an organization that you didn't agree with, is that right?

A. That's right.

Q. Thank you. And the same is true, you took out a mortgage on your . . . where did you get the $25,000? You went to a bank?

A. I went to a bank and borrowed it.

Q. And you borrowed it at the same interest rate, 13.4 percent?

A. That's right.

Q. And you were going to have to get a monthly payment to that bank each month by a certain date, is that right?

[192] A. Right.

Q. And you were to get nothing out of this?

A. That's right.

Q. Except grief?

A. Right.

Q. And you were doing this for an organization that you didn't agree with and didn't support?

A. That's right.

Q. Campaign or publications, to whom you made the loan, did you understand that they published the newspaper that you disagreed with when you made the loan?

A. Yes.

Q. So you were making a loan to an organization to publish a newspaper that you had already read and disagreed with?

MR. RUSSELL: Your Honor, arguing with the witness.

THE COURT: The question is argumentative. I sustain.

MR. FLANNERY: Yes, Your Honor.

Q. Until approximately June of 1984, isn't it a fact that you were the accountant/office manager for a [193] construction company in Maryland with a lot of interstate business?

A. Yes.

Q. Isn't it a fact that you did the accounting for this multi-million dollar construction company?

A. Yes.

Q. So you know something about business and finances, isn't that fair to say?

A. That's right.

Q. Isn't it a fact that Mrs. Ascher told you that her background was as a teacher and a political activist?

A. No, she didn't tell me that.

Q. When is the first time you were visited by anybody from the Commonwealth of Virginia?

A. In 1986.

Q. And do you recall who that was?

A. Charles Bryant.

Q. And how long did you meet with Mr. Bryant?

A. About a half hour, 45 minutes.

Q. And this was after the raids in Leesburg, is that correct?

A. Yes.

Q. Then you knew about the fact that there had [194] been a raid on the Leesburg headquarters, is that correct?

A. I read it in the paper.

Q. And you knew, since 1984, that this organization expressed a position in political matters that was not yet accepted in the nation, is that correct?

A. Yes.

Q. And isn't this meeting with Mr. Bryant the first time you are on record ever telling anybody outside of the LaRouche organization anything about your loan?

MR. RUSSELL: Objection, Your Honor. I don't see the relevance of that. When a particular person made a complaint to someone else outside of the organization itself is not relevant to this proceeding. It's certainly not something that the Commonwealth has gone into with other witnesses.

MR. FLANNERY: Your Honor, this witness is on record of talking about his relationship of these loans up to and including his appearance in this courtroom. At one point, he made some remark about up to this day in 1989.

THE COURT: I sustain the objection.

A. Dunn, Direct
3/13/89
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[**Page 86**] MR. CHABALEWSKI: Your Honor, if an individual was inquired of as to why they loaned the money, it's because they were told certain things by individuals who have been established to being co-conspirators.

There has been no underlying foundation of that at this point in time, nor are there any statements that have been made to him by a co-conspirator. Consequently, anything that's being offered by this witness is being offered beyond that limited exception.

THE COURT: The Court overrules the objection as the answer would be the basis for action taken.

MR. FLANNERY: Thank you, Your Honor.

Q. For what reason did you loan the money to Caucus Distributors?

A. They needed money and I knew that some money had been . . . $200,000 had been taken out of their bank account . . .

MR. CHABALEWSKI: Your Honor . . .

* * * *

[89] A. Well, it's a loan that I made of $5,000 to CDI, Caucus Distributors, at a rate of interest of 4 percent. And I could get more than 4 percent in a money market fund or in a T bill account. At that time particularly, I think it was maybe 8 or 9 percent. So, I don't look at that as an investment.

They needed the money and if I . . . I'd be happy if I got it back but, you know, a political contribution is notorious for not being . . .

MR. CHABALEWSKI: Your Honor, could we have a question? I mean . . .

THE COURT: There's no question about that answer, Mr. Flannery. I sustain the objection.

Q. And you stated earlier that you made the note in and around, I think, the summer of '85. Is this document a different loan or is that . . .

A. No, that's . . . that's the loan, it's $5,000.

Q. Okay. And this is dated April of '85. Is this the same note that you were referring to?

A. Yes.

MR. FLANNERY: Your Honor, I offer 237.

C. Jones, Direct
3/13/89
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[**Page 115**] A. I moved to Texas in 1982. I was in Dallas briefly and then I moved to Houston, where I've been since.

Q. Now, what was the purpose of this airport solicitation?

A. Well, the purpose of the airport activity was to recruit people to our ideas. And we would set up these tables with signs on them which described our political position on various issues.

We would attempt to stop people, would attempt to introduce them to Lyndon LaRouche. It would depend on what period of time you're talking about because the activity would . . . the specifics of the activities change over time.

But our basic reason for being there throughout was to introduce people to LaRouche, number one, introduce people to the political ideas we were doing, number two. Introduce them to our tactics, our methods for trying to achieve the political objectives that we were aiming towards.

And if they agreed with all that, we would try to get them involved, by contributing money and by giving

H. Griffith, Direct
3/14/89
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[**Page 27**] (The document referred to was marked for identification as Defendant's Exhibit No. 249 through 251.)

BY MR. FLANNERY:

Did you make these as a result of conversations with Ms. Ascher?

A. That's correct.

Q. For what reason did you make these loans?

A. I was instructed, as we talked, about the need for various funds for the various activities, and some of those—there are three loan documents there. Two of them relate to general finances of the organizations and one relates to, I believe, the—two of those are the Fusion Energy Foundation and one of those is to the general needs of the organization. I was supporting the efforts to continue the strategic defense initiative and the efforts of the Fusion Energy Foundation. Primarily for the purpose of providing low-cost electricity and development for the United States and the rest of the world.

Q. Did you consider this some sort of financial [28] investment?

A. No, I—

MR. CHABALEWSKI: I'm going to object to this witness' feelings as to what he was doing with his money. That's not relevant as to what other individuals, namely the individuals in the indictment, felt was the purpose of their handing over the money.

MR. FLANNERY: Your Honor, I tried to object to every other witness who came in here and had nothing to do with this case, and I was told that it showed the general—

THE COURT: Just a minute, Mr. Flannery. The Court will permit this line of questioning and put you on terms to link it up later.

MR. FLANNERY: Yes, Your Honor.

THE COURT: I overrule the objection.

BY MR. FLANNERY:

Q. You may continue your answer, sir?

A. The purpose for the loan was to permit the [29] publication and distribution of information—

THE COURT: The question, Doctor, was did you consider this an investment?

THE WITNESS: Oh, I understand. In the sense that I was supporting them as much as I could, I made these loans because I felt that it was inappropriate for me to give finances at that time beyond the limit which I had already given. So, I wanted to help them, but I did not feel that I could help them with further gifts at that time, so I was encouraged to make the loans and I did that to support their activities rather than to make a profit or to enhance my family's net worth.

BY MR. FLANNERY:

Q. Directing your attention to 250 and 251, what was the interest rate that you agreed on for these loans?

A. These loans were for a period of one year at no interest.

Q. And so they were due on or around September 1987, is that correct?

A. That's correct.

J. Hereford, Direct
3/14/89
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[**Page 58**] A. No, I think that was on the newspaper, the fact that—

MR. CHABALEWSKI: Your Honor, I object.

THE COURT: Sustained.

BY MR. FLANNERY:

Q. Did there come a time when you made loans after November of 1984?

A. Yes.

Q. And for what purpose did you make these loans?

A. Their effort was to keep the cash flow moving until they could return or get the money that had been supposedly illegally—

MR. CHABALEWSKI: Your Honor—excuse me, Mr. Hereford.

THE WITNESS: All right.

MR. CHABALEWSKI: I have no objection to commentary made by Anita Gallagher or Barbara Boyd. We have identified them as co-conspirators, Your Honor, but we don't know who is saying what.

THE COURT: I understand

[**60**] A. Yes, I did.

Q. What was the amount of this note?

A. $500, I think.

Q. For what purpose did you make this loan?

A. Again at their request to help with the cash flow until funds could be recouped from the seizure in Boston. The fact that they—

MR. CHABALEWSKI: Your Honor, excuse me. Maybe at this point we need clarification. But if this is what Anita Gallagher told him, that's fine.

THE COURT: Yes, the question Mr. Flannery put, after a conversation with Anita Gallagher.

MR. CHABALEWSKI: Thank-you, Your Honor.

BY MR. FLANNERY:

Q. Did you consider this an investment, sir?

A. Not really in that sense. Politically, no.

Q. When did you consider the risk of the loan?

A. Fairly risky. They were—they seemed to be doing well as far as buying television time, phone

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M. Fairchild, Direct
3/15/89
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[55] A. Yes, I did. In fact, that was around the seizure of the funds of the First Fidelity Bank of the campaign funds from the LaRouche organization.

There was to be a pre-election television broadcast and the $270,000 was seized out of a bank account just days before the television show was to occur.

Q. Did there come a time, after you had been advised of the bank seizure, when you made a loan to the organization?

A. Yes, there did.

Q. Now, when did you do that?

A. Well, I don't remember exactly, but it was early 1985.

Q. And what was the amount of the loan?

A. It was about $2,000.

Q. And do you recall the terms of the loan?

A. No, I don't, actually. It seems to me it was over a year or so, but I'm not exactly sure.

Q. And did you make this loan following a conversation with anyone?

A. Yes, with Paul Greenberg.

Q. And for what purpose did you make the loan?

[56] A. Well, to further the efforts of the organization. I agreed with what they were doing.

Q. Did you consider this an investment?

A. Not in the sense of a financial investment, but an investment in the future of America, yes.

Q. Directing your attention to July of 1985 what, if anything, did you do at that time?

A. I attended a conference in the Washington, D.C. area, which was a meeting for the inalienable rights of man. It was a national conference put on by the Schiller Institute, which is associated with Helga LaRouche, Lyndon LaRouche's wife.

Q. And what, if any, determination did you make as a result of that conference?

A. I decided to go full time organizing with the LaRouche organization.

Q. And approximately what month and year did you do that?

A. Well, I made the decision in July of 1985 and I actually ended up going full time with the LaRouche organization in November of 1985.

Q. And what was your salary at Hewlett Packard at the time that you made this decision?

* * * *

G. Eddleston, Direct
3/15/89
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[79] Court's recollection. However, the Court will overrule the objection as a basis for action that may have been taken.

MR. RUSSELL: Very well.

Q. And were you aware of the financial condition of the organization in and around March of '84 as a result of conversations with Christine Douglas?

A. Yes. I realized that they were stretched for funds and they needed money.

Q. And how many loans did you make to the organization?

A. I made seven loans to the organization during that period.

Q. And about how much money?

A. About $29,000.

Q. And to what organizations or companies did you specifically make these loans?

A. Caucus Distributors and Campaigner Publications.

Q. And for what purpose did you make these loans?

A. To expand the subscription base and to put Mr. LaRouche on TV during the Presidential Campaign.

Q. And was this a business investment?

A. No, it couldn't be considered a business [80] investment, from the standpoint that it was unsecured. There was no way in which I could legally get the money back if things went sour. I knew that.

Q. And for what purpose did you make the loan?

A. Well, because I philosophically believe in what the organization is trying to do, especially around the idea of progress in the world and the fact that there is starvation going on in the world. I'd like to see that done away with. I'd like to see development and progress.

Q. What, to your knowledge, was the source of the monies to repay any such loans?

MR. RUSSELL: Basis for knowledge, Your Honor.

THE COURT: Cure the objection.

Q. Did Christine Douglas inform you what was the source of . . .

A. Oh, yes. Publications, the organization sold publications and it relied on donations from individuals.

MR. RUSSELL: Your Honor, excuse me. As I understand the Court's ruling, if he took action as a result of what Miss Douglas may have said, then her statements can come in. But . . .

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G. Eddleston, Cross
3/15/89
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[87] A. Okay. Christine Douglas told me the organization was under financial warfare from the federal government, yes.

Q. In March. . .excuse me. . .in February of '85 when you made your loans calling for monthly payments, do you recall whether Christine Douglas told you that other lenders that had similar loans calling for monthly payments were not getting their monthly payments?

A. She never told me that, no.

Q. When you forgave your loans that was in May and July of '86, is that correct?

A. Yes.

Q. Well before the October, '86 raid you talked about?

A. Yes.

Q. And when you forgave them, you had not been receiving the monthly payments on your $5,000 and $16,000 loans as called for, is that correct?

A. Yes, that's right.

MR. RUSSELL: One second, Your Honor.

THE COURT: Yes.

MR. RUSSELL: No further

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C. McCarthy, Direct
3/15/89
* * * *

[103] Q. At what interest rate did you make those loans?

A. Oh, zero percent.

Q. Did you consider this an investment?

A. Oh, heavens, no.

Q. For what purpose did you make these loans?

A. At this point in time I really don't know the specific purpose. I just knew that the organization needed money at that time and I was willing to help.

Q. And what, to your knowledge. . .pardon me. Did Kathy Wolfe tell you the source of the monies to repay loans and to run the organization?

A. From supporters.

Q. And what, if anything, happened to the loans that you made?

A. I forgave the loans. Linda Robinson came to me with a paper and I signed it forgiving the loans.

Q. And for what reason did you forgive the loans?

A. What reason did I forgive the loans?

Q. For what reason did you forgive the loans? Pardon me, if I. . .I'll speak up if you have trouble hearing me.

A. Right. Well, in my mind, they were essentially a gift, a donation.

* * * *

[110] A. Yes.

Q. . . .is that right?

MR. FLANNERY: Your Honor, I move 263 and 264 into evidence.

MR. RUSSELL: Same procedure, Your Honor.

THE COURT: Very well. We'll deal with those during recess.

Have you concluded your examination of the witness?

MR. FLANNERY: Yes, Your Honor. Pardon me for not. . .

THE COURT: All right. Cross examine?

MR. RUSSELL: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. RUSSELL:

Q. Mrs. McCarthy, you said, I believe, that the two loans that you made you forgave them because you essentially considered them gifts or donations, is that correct?

A. Right.

Q. And the fact that you made it at zero percent [111] was, again, because you always considered it to be a gift or a donation?

A. Right.

Q. And When Mrs. Wolfe talked to you in 1984 before you made your loans, I think you said that they were always needing money. And I think you mentioned that she told you about the problem and, I guess, before your first loan in November, she told you about the fact that a bank account had been seized.

A. Right.

Q. Did she tell you about the fact that they were having a hard time paying their bills?

A. I don't remember.

Q. Did she tell you in November of '84 that they were having problems repaying lenders who had loaned money previously?

A. No.

Q. When you talked to Mr. Rosenblatt, did he tell you that lenders were not getting repaid because of their financial difficulties?

A. No.

MR. RUSSELL: Your Honor, if I could approach the bench one second, please?

* * * *

A. Yes, to the Fusion Energy Foundation, Campaign Publishers, I think, and Publication and General Management. There was about four of them and I think the other one was Caucus Distributors I believe was the other one.

Q. And did you discuss these loans with Rochelle Ascher before you made them?

A. Yes, I did.

Q. Did she apprise you of the financial condition of the organization in or around '83?

A. Yes, she did.

Q. What was the—what did she tell you the financial condition was?

A. She advised me that they basically operated on a week-to-week budget and they did whatever they could based on what ever money that they were able to take in, you know, from week to week.

Q. What, if anything, did she tell you about office expenses?

A. She told me what the salaries of the people that worked for the organization was. She told me what their expenses were. She indicated that many times they had difficulties in keeping their phone bills and [62] utilities paid up and rent for buildings and so forth.

Q. For what reason did you make these loans?

A. The reason I made these loans—first of all I think that I should say that I did my own personal investigation—

MR. CHABALEWSKI: Your Honor, that is not responsive.

THE COURT: I'll sustain the objection. Listen to the question, please sir, and answer the question directly and succinctly.

THE WITNESS: Okay, would you repeat the question.

MR. FLANNERY: Sure.

BY MR. FLANNERY:

Q. For what reason did you make the loans that you did?

A. I did it because I wanted to be a part of the ongoing battle between what I consider is good and evil; between moral political policies versus immoral political parties. Or, in other words, between the American system of Government as was given to us by our forefathers 200 years ago versus the British Colonialism [63] Malthusian type government which we have been in battle with ever since the revolution of this country.

Q. Was this—were these loans investments for you?

A. No, they were not.

Q. What did you understand the risks of these loans to be?

A. I understood that they were a very high risk.

Q. For what reason did you consider them high risk?

A. Because of the fact that I knew the financial situation of the organization and I knew that the funds were for getting across political ideas to the American people and to our Government and that there was probably no guarantee that I would ever be repaid.

Q. Did there come a time when you went to Baltimore, Maryland to the LaRouche offices?

A. Yes.

Q. When was that?

A. That was probably y early in 1984.

Q. For how long were you there?

A. I stayed two or three days.

* * * *

R. Watson, Cross
3/16/89
* * * *

[77] of interest, didn't she?

A. Yes.

Q. And she explained to you that if you loaned them your money that you could be helping a cause, plus you could be making the prevailing rate of interest?

A. Well no, that was never really discussed in that manner.

Q. She didn't discuss the interest rate?

A. She discussed the interest rate, but it wasn't—we didn't discuss it as far as being a money making investment in any sense.

Q. You made one loan you said at zero percent, so you certainly didn't intend to make any money on that one, right?

A. I didn't intend to make any money on any of them.

Q. But the other loans other than that one at zero percent were going to pay you interest according to their terms?

A. Yes.

Q. You made loans to, you said, Caucus Distributor's Incorporated?

A. Yes.

* * * *

H.N. Butler, Direct
3/16/89
* * * *

Q. In either law or in business or economics?

A. No.

MR. RUSSELL: That's all the questions on qualifications, Your Honor.

THE COURT: Objection?

MR. RUSSELL: As to limiting his qualification to business and economics, yes, Your Honor. Because I don't think that's a proper statement of his expertise. I don't think that can be separated out from his expertise in the area of law.

THE COURT: Overrule the objection. You may testify in the field of . . . I believe you offered in business law, Mr. Flannery?

MR. FLANNERY: Yes, in business and economics, yes, Your Honor.

THE COURT: All right.

CONTINUATION OF DIRECT EXAMINATION

BY MR. FLANNERY:

Q. In the business and economics sense, what is a security?

A. Well, in essence, a security is a right to share in the profits of an enterprise that's run by others. There are several features of securities that help us [142] identify why a certain instrument would be considered a security. Things like the security being issued as part of a series in the same denomination over the same percentage claim.

For example, a stock issued by a corporation; a share of stock issued by a corporation represents a percentage

claim on the earnings. So, for example, if General Motors issues a million shares of stock, then each person who owns a share of stock has a claim on one one-millionth of the shares . . . of the earnings of General Motors.

Similarly, if General Motors issues bonds which are debt, essentially borrowing money from the people who buy the . . . who purchase the bonds, the bonds are typically issued in a fixed denomination for a whole series. So there would be, say, a thousand bonds issued with a $1,000 par value. It would all be the same.

And then other features that would go along with them would be that these securities, because they have these . . . there are a large number of them that have the same denomination and the same percentage claim on the earnings of the corporation, could then be traded. A market typically develops for them and enhances the [143] ability of the firm to sell them in the first place.

Q. What would be an example of a typical security, then?

A. Well, in addition to the kind of the General Motors type example I gave you, you could think of why securities are issued in the first place.

And generally you could start off and take an entrepreneur who's started up a business, has some idea to run a business, gets it going but finds the ability to expand the business being limited by his own financial capital.

Now, he could go to a bank and borrow some money, but sometimes banks are not willing to take as much risk as is oftentimes taken in the securities market. So an alternative would be to issue some shares of stock and sell this stock to investors where the investors hope to receive a return on that stock in the form of dividend payments in the future.

Or another way to get financing would be through the issuing of bonds where the bonds would be paid off out of the profits of the organization in the future.

Q. Now, you spoke about a series of stocks or bonds. Each of those are identical to each and every [144] other share, is that your . . .

A. Within the series, yes.

Q. Now, what is the purpose, in a business or economic sense, for selling securities in a series of identical stocks or bonds?

A. Well, it's to create a market for the securities so that people who are holding onto a share, after the share has been sold, initially issued, can then figure out what a fair price for that share is, by looking at what the market price is. And that enables investors to essentially be protected by knowing what the value of it is.

Q. Well, is it your opinion then that an individual negotiation over the terms of the note is a factor that weighs against or for characterizing the note as a security?

A. Individual negotiation is not a typical characteristic of a security. Because securities are offered to the public in a fixed denomination with a bond, so it will have a yield. Stocks are just sold at whatever the best price a corporation can receive and there's no face-to-face individual negotiations associated with securities at all.

[145] Q. Well, isn't a loan like the sale of a security in that someone gives up money now in exchange for the promise of a larger payment later, in the usual case?

A. That is . . . that is correct. They are like each other.

Q. So then in what sense are loans and security sales different?

A. Well, I think the big difference is, that when money is being loaned it's not viewed as an investment in the business. So in no sense taking a stake in how a business is going to work, how successful the business is.

Q. Well, could you make an illustration of that, say, with a bank loan to an individual?

A. Well, a bank loan to an individual, obviously, the banks evaluate the earnings potential of the individual, or for a business they'd evaluate the earnings potential of the business.

But unless they receive some type of security interest in a business, then they don't care how the loan is paid back off. And . . .

Q. So does it matter then that the customer will repay the loan with the money he's earned?

A. Does it matter to the bank or to the . . .

[146] Q. Well, to the sense that it's a security.

A. It doesn't really matter in that sense because . . . or perhaps it does matter. What does matter is that the . . . from a bond . . . if it is a security, that the earnings definitely will be coming from the corporation or . . . a corporation is the best example. Whereas with a loan, the earnings could be coming from anywhere.

Q. I'm going to describe the sale of some notes to you. I'd like you to listen carefully and give me your opinion on whether or not the notes I describe are, in a business or economic sense, like the securities you've described.

The notes are obligations of essentially political organizations devoted to spreading information about subjects such as weapons, AIDS, drugs and the Soviet Union, not to running a business or making profits.

The terms of the notes are not uniform and are individually negotiated. The proceeds from the sale of these notes are used in pursuit of these political goals, to purchase a variety of goods and services not intended to make the companies profitable.

The note buyers understand that the proceeds from the sales of the notes are to be used for political [147] activism that is not economically profitable.

Are notes such as these securities in a business or economic sense?

A. No, they would not be securities.

Q. And for what reason?

A. Well, if we go down kind of the list of things we've been talking about, one . . . a key one would be that there is the mixed denomination. There's no uniformity across the securities in terms of prices or terms.

And there's another issue would be whether or not . . . how the securities are going to be paid off. It doesn't sound like an investment in an enterprise that's expected to generate a profit to pay it off.

And there's the question of the transferability of these things. It would appear to be very difficult to transfer and create a market price for such an instrument because of the lack of uniformity.

Q. What would a secondary market, or how could one possibly create a market in notes individually negotiated with individuals?

A. It would be very difficult to do, but one way to do that . . . and what is happening a lot these days . . . is what's called the securitization of loans where individual [148] notes, say, for example, General Motors Acceptance Corporation takes a large number of automobile loans, bundles them together and then sells securities that are backed up by those individuals loans. And that's called the securitization of loans which draws the killer distinction between one that's marketable and one that is not marketable.

Q. Are the notes securities as the buyers expect to get paid the principal and interest on the notes?

A. The notes are not . . . well, of course the buyer expects to get repaid. But the difference is that . . . be-

tween the note and these . . . and a security, is that the notes do not appear to be investments in an enterprise to earn a profit.

Q. Are the notes securities of some portions of the company's activities, such as the publication of a book that are intended to or do make money?

A. Not if it . . . not if it appears that the purpose of the corporation is not . . . or of the organization is not to earn a profit through those activities to pay them back.

Q. Is there any analogy, for example, between bingo or some other undertakings?

[149] A. Well, I think, say, for example, if a church runs a bingo operation which then provides some revenue for running the church, that doesn't turn a church into a business. And I think that would be an analogous type situation.

MR. FLANNERY: Thank you very much, sir. That concludes my direct, Your Honor.

THE COURT: Do you wish to ask any questions?

MR. RUSSELL: Well, I think the Court can rule that this expert is no more admissible than our expert, but . . .

THE COURT: Do you want to be heard?

MR. FLANNERY: Yes, Your Honor.

THE COURT: All right. Do you mind being heard in the presence of Dr. Butler or . . .

MR. FLANNERY: I don't mind . . .

A. It doesn't bother me.

THE COURT: Sir?

MR. RUSSELL: I would request

* * * *

[155] circumstances be a security.

Your Honor, thank you.

THE COURT: The Code of Virginia tells us what a security is and I don't understand why either side brought a law professor here to tell us what a security is.

I'm sorry that both of these distinguished gentlemen have been brought here and suffered the embarrassment of not being permitted to testify.

I make the same ruling regarding Dr. Butler that I made with regard to the law professor from the University of Virginia brought here by the Commonwealth.

Would you please offer the Court's apologies to him, Mr. Flannery?

MR. FLANNERY: Yes, may I do that?

THE COURT: There's no point in the Court . . . that the Court had no desire to embarrass him.

MR. FLANNERY: I don't think he would be embarrassed and I will pass on the Court's concern.

* * * *

R. Hull, Direct
3/16/89
* * * *

Q. And for what reason did Mrs. Ascher tell you they needed the loan?

A. This was for the series of television programs with LaRouche speaking. And they were primarily to campaign against Mondale, at the time.

Q. Was that the reason you made the loan?

A. Yes.

Q. Did you consider it an investment?

A. No. I was thoroughly against Mondale and I was glad to do what I could to keep him from getting elected.

Q. Did Mrs. Ascher tell you what the source of monies would be to repay such loans?

A. Yes. There would be individual's contributions.

Q. Did there come a time when you made any other loans in '84 and '85?

A. In early '85 I made a couple of other loans to the organization.

Q. Do you recall who, if anyone, you spoke to before you made those loans?

A. John Gallagher and Anita Gallagher, were the two people I talked with at that time.

Q. What, if anything was said to you before you made the loans, by these individuals?

* * * *

S. Gregory, Direct
3/17/89
* * * *

[51] loan, the $2,000 loan.

Q. And do you recall who you had a conversation with before you made that loan?

A. Well, it was . . . I don't recall everybody individually. I know Stu Rosenblatt because . . . not just because his name's on the paper, I've talked to him several times since then, but . . .

Q. Well independent of his name being on the paper, do you recall that it was him as opposed to someone else who spoke?

A. Well, over the course of the time which I was negotiating the loan, there was many people. There was women that I talked to and there was some other gentlemen that I talked to. It wasn't just one person from start to finish.

Q. And when you made this loan, for what purpose did you make the loan?

A. Essentially, to help out the cause. I don't know how specific or what details we need here. It was to help the organization to pursue the . . . pursue our objectives, I guess. But that's the best I can . . .

Q. Do you know what the source of monies was to repay the loan at that time?

* * * *

R. Ascher, Direct
3/20/89
* * * *

Q. Now, are the Freemans individually or both of them members of the NCLC?

A. Yes, they are.

Q. Have you ever been a member of the NEC yourself?

A. The NEC, no.

Q. Have you ever been a National Committee person?

A. No.

Q. Were Mr. or Mrs. Freeman NC members?

A. Members of the National Committee, yes.

Q. Who in the Baltimore office was responsible for financing, if you know?

A. Well, overall, budgets and finances of the regional operation only would have been Debra Freeman. Marty Glaernough does the books. . .has done the books for some time.

Q. What position, if any, did you hold in the office?

A. I didn't have any official position.

Q. And what responsibility did you have?

A. I was responsible for running the phone organizing, the fund raising organizing.

Q. Do you know a person by the name of Linda Robinson?

* * * *

[78] Q. Mrs. Ascher, please continue.

A. Yeah, I told him that Worthing Wells, who was the U.S. Attorney in Boston had launched a Grand Jury in-

vestigation of the organization for fraud. That this was leaked to newspapers all over the country. I told him that NBC had fined the organization $3 million, you know, based on a TV broadcast they had done attacking the organization.

I told him that as a result of these 15 broadcasts Mr. LaRouche had done, that our political enemies were determined to shut the organization down to completely bankrupt us, to destroy us, to put us out of business, that's what I told him.

Q. And did you ask him for any money during this conversation?

A. Yes, I asked him for money.

Q. And what, if anything, did he do?

A. I asked him for contributions, I asked him for loans. He made contributions to the organization to help us. We were in trouble.

Q. Now, at the time that you were having conversations with other supporters, would you tell them in essence the same thing?

* * * *

[82] I said, we've got the FBI documents, Henry Kissinger and the FBI are holding investigations, they're accusing us of being funded by hostile foreign powers. Henry Kissinger and others have demanded an investigation by the FBI. The FBI has started an investigation of us.

They are starting an investigation because they're saying, where do we get out money? They're accusing us of being funded by hostile foreign powers. I said, we're holding a press conference on this, we're going to get this out all over the world.

Q. What, if anything, did Ware do as a result of your conversation?

A. He. . .I mean, I talked to him a number of times and then he made more contributions, he made another loan.

Q. What, if anything, did you send him after this conversation?

A. Oh, I sent him all the. . .I sent him the press coverage, I sent him the redacted FBI documents. . .I sent this out to everybody. I sent the FBI documents. I sent him copies of the press coverage, our press conference. We sent this out, you know, through our newspaper, all the subscribers and he was a subscriber.

(WHEREUPON, the documents referred to were marked Defendant Exhibits #293 and #294 for identification.)

* * * *

[85] Q. And on or about what date did you have that conversation?

A. Either the day that's on the loan note or within a few days of the loan note.

Q. What, if anything, did you say and what did he say in that telephone conversation?

A. I called him up and I said, Bob, we have an emergency. We are being fined $10,000 per day in Boston. $10,000 against Caucus Distributors, $10,000 against Campaigner Publications, $10,000 against the National Democratic Policy Committee, $10,000 against Fusion Energy Foundation. We're being fined $40,000 a day against our corporations.

Our political enemies are trying to shut us down and they're trying to bankrupt us. We're appealing the fines, but it's an emergency. We have to have money, I need your help.

I asked him to make a contribution, I asked him to make a loan for as much as he could possibly do. And he agreed to make a $1,000 loan.

Q. Now, you may recall that when Mr. Hintz testified, he testified that he circulated a memo in and around March of 1985, do you recall that testimony?

* * * *

[97] Q. In the period May of '83 through February of '84?

A. Well, starting with the early loans he made loans to further the whole work we were doing around the SDI. I gave him the same briefing I gave Robert Ware. In March of '83, April of '83, I briefed him on the fact that we were publishing the beam weapon book. I briefed him on the fact that we were holding conferences all over the world, all over the United States.

I briefed him on all of our publishing activity, all of our political organizing, all the candidates we were running for public office. And I told him everything we were doing and he gave loans and gifts to further our efforts.

Q. Now, directing your attention to March of 1984, did there come a time when he made two more loans?

A. March of '84?

Q. Do you need to make reference to any notes?

A. I'd probably have to look up his loans, yeah.

Yeah, I think. . .yeah, he made loans in March of '84.

Q. Directing your attention to LF1H and LF1J, do you recall Dr. Allen making loans in March of '84?

A. Yeah, he made. . .yeah, he made these loans.

Q. Did you have any conversation with him in March of '84 before he made those loans?

A. Oh, yeah, I had. . .I had a conversation with him before both these loans.

* * * *

[99] about the suits that the organization initiated, as the witness has just indicated, I'd like to have the basis of who told her.

Q. Did you say. . .

A. I told Dr. Allen we were initiating a lawsuit against NBC.

Q. Now, for what reason did he tell you he made these loans in March of '84, Dr. Allen?

A. For what reason?

Q. Yes.

A. He made the loans. . .he told me he made the loans because he knew we were having some success, if we were getting that kind of a response, and he wanted us to continue to have that kind of success. He knew that we were getting some people very angry. That's what he told me.

Q. Now, directing your attention to LF1T, a loan to Dr. Allen in November of '84 on CDI, LF1V, a loan to Dr. Allen, November 30th, '84 for PGM and LF1X, a loan to CDI on December 29th, 1984 from Dr. Allen. Do you recall him making those loans?

A. Yeah, I signed these loans. I remember him making these loans.

[100] Q. Did you have a conversation with him in November and December of '84 before he made those loans?

A. Yes, I spoke to him several times.

Q. And what did you tell him in those conversations and what did he say?

A. I told him the same thing I told Robert Ware. I called him before the first loan and I said, Dr. Allen, our First Fidelity account has been. . .

THE COURT: If it's the same thing she said to Ware. . .

A. Yes, I said. . .

THE COURT: . . .you don't need to repeat the same. . .

A. I said the same things I said to Robert Ware. This is the same period of time.

Q. Okay.

A. I told him about the banks being seized, the fines, everything.

Q. All right. Directing your attention to LF1Z, a note to CDI involving Dr. Allen on around February 8th, 1985, do you recall him making a loan on or about that time?

A. Yeah, I specifically remember talking to him [101] about this loan.

Q. And what did you say to him before he made that loan and what did he say to you?

A. I said, Dr. Allen, you remember I told you we were going to print the *Dope, Incorporated* book and he said, yes. And I said, well, within the last 72 hours there's been a raid in our offices in Caracas, all of our members have been thrown in jail, our book has been banned.

I said that all of our correspondents have been deported out of Venezuela. I said, the book was banned from circulating in Venezuela. I told him that we were going to reprint the book in publishing houses in Columbia and in Peru and in Argentina. I told him we were going to publicize about the narcotics traffickers in the United States. And I told him we needed help.

Q. Do you know a gentleman by the name of John Merrymount?

A. Yes, I know John Merrymount.

Q. And do you know what position he held when he first spoke to you?

A. Yes, when I was speaking to him he was a Naval Commander. . .active duty Naval Commander and he was. . .I

* * * *

[105] A. Yeah, I think he made a loan in August of 1983.

Q. And for what reason did he make that loan?

A. Well, I spoke to him, I told him what we were doing in terms of the beam defense and that's why he made the loan.

Q. Directing your attention to LF5F, is that the August '83 loan with Mr. Merrymount?

A. Yes, this is the loan he made.

Q. And for what reason did he make it to Campaigner Publications, if you recall?

A. Because Campaigner Publications publishes everything that we were printing. Finances, all about political issues.

Q. And was there any particular publication or book or pamphlet that. . .

A. There were a number. There were a number of publications. We published the beam defense book, we published *EIR*, published a special report about the strategic defense initiative. We published a pamphlet for distribution on the streets. A number of. . .a number of pamphlets and books on SDI.

Q. Directing your attention to LF5A, do you recall him making this loan in March of 1984?

[106] A. Yes, I remember him making this loan.

Q. And did you have a conversation with him before he made that loan?

A. Yeah, I had a conversation with him before he made that loan.

Q. And what did you say and what did Mr. Merrymount say in that conversation?

A. In March of '84?

Q. Yes.

A. I told him the same thing I told everybody else in March of '84. I told him about the First Camera broadcast, I told him about what First Camera said. I called him up and I said, John, did you watch the NBC TV broadcast?

THE COURT: Maybe the Court can shorten this.

A. Okay.

THE COURT: You say you told him everything that you said to everybody else. . .

A. Well, I specifically. . .

THE COURT: That would include Mr. Ware?

A. Yes and I specifically asked him if he. . .

* * * *

[111] that we needed short term loans until the permanent financing came through. And he agreed to make a $5,000 loan so that we could lay the foundation for the building before it got cold.

Q. Now, was the foundation laid?

A. Yeah, we laid the foundation in the fall of that year, yes.

Q. Now, did there come a time when you had a conversation with Mr. Bolton after he made this loan about the repayment of that loan?

A. Yes.

Q. And do you recall when that was?

A. Well, I talked to him sometime after the beginning of '85, January or February of '85.

Q. And what did you say and what did he say?

A. I called him up and told him that after our bank accounts were shut down, the First Fidelity, the Chemical Bank and the Banko, after all our funds had been seized, after all this had happened, that the local banks that had agreed to do the financing were backing out on their commitment and were not going to do the financing.

Q. And what, if anything else, did you tell him?

A. I told him that we were still trying to find

* * * *

[119] the specific contributions. She made loans because she absolutely believed that what we were doing on the SDI was vital to the security of the nation, that we had to have an SDI policy and that we had to have a strong defense.

She gave loans and gifts specifically to help us get Proposition 64 on the ballot and to try to get the publicity so that we could get it passed. And she made several contributions for our fight with drug money laundering. She made one of the contributions you showed me.

I called her and I told Cathleene, I said, Cathleene, you know, William Weldt, the U.S. Attorney that's been running the Grand Jury fraud investigation of us in Boston; he's going to be named head of the Criminal Division of the Department of Justice. And we're going to be holding demonstrations, we're going to be testifying to stop his nomination. I told her that the Weldt family was involved in pushing drugs.

And she gave money to distribute all of that material, to stop Weldt's confirmation as head of the Criminal Division.

Q. Now, did you tell her what, if anything, Mr. Weldt had been doing?

* * * *

[121] Weldt was about the become head of the Criminal Division.

I told her that Weldt's policy was to try to shut the organization down. I told her that Weldt's policy was to bankrupt us. I told her all of this. I told her it before, I told her it during.

Q. Mrs. Ascher, are you anti-Semitic?

A. No, I'm Jewish.

Q. Following the raid in October of 1986, did you have any conversations with Mrs. Waddell?

A. Yes, I did.

Q. And what did you say to her?

A. I told her about the raid. I told her that there had been a raid of our national headquarters in Leesburg. I told her that there were federal and state agents that had raided our major headquarters. I told her that there were helicopters, I told her that there were bomb sniffing dogs, I told her that there were armored personnel carriers going through the streets of Leesburg and I told her that they beat down the doors.

I told her that people had been arrested. I told her that we needed money for legal defense, to defend ourselves against this. That's what I told her.

Q. Directing your attention to W6W, Commonwealth's [122] exhibit, a loan on November 14th, 1986. Did you. . .

THE COURT: W6 what?

MR. FLANNERY: I'm sorry, Your Honor, W6W.

THE COURT: Thank you.

MR. FLANNERY: Yes, Your Honor.

Q. Did you tell her this before she made this loan on November 14th, 1986?

A. Oh, yeah. I told it to her. . .the raid occurred in October. I told it to her after October and I told her our bank accounts were being seized and everything.

Q. And did you continue to brief her up to and including January 20th, 1987 when she made a loan on that date, W6Z. . .

MR. FLANNERY: Your Honor. . .

Q. . . .on or about January 19th, 1987?

A. I was talking to her or Stu Rosenblatt was talking to her. I didn't make this loan, but I was talking to her all the time, every day.

Q. Now, you may recall when she testified that she didn't know what the initials CDF meant?

A. I heard her say that.

* * * *

[124] Q. And do you recall her testimony that she had her stroke in March of '87?

A. Yeah, I remember her testimony.

Q. Do you know a person by the name of Marion McNinch?

A. Yes, I know Marion McNinch.

Q. And do you recall his testimony that he gave you money as a, quote, investment, his testimony to that effect?

A. I heard him say that.

Q. Did Mr. McNinch tell you that he was giving you the money as an investment?

A. No, he did not.

Q. And for what reason did he say he was lending the money?

A. I spoke to Marion McNinch. I asked him to make gifts, which he did. I also asked him to make loans. He specifically told me that he was loaning money to this organization because we were the only people in the United States who had the guts to stand up to Henry Kissinger. And he wanted us to be able to get the information on Henry Kissinger out.

Q. So then it wasn't for the three percent, as he

* * * *

[143] the period.

A. I was aware of a policy starting in, I think, 1986 to take . . .

MR. CHABALEWSKI: Your Honor, I'm going to object to the policy unless, again, we have a foundation of who told it to her, when it was told to her and where it was told to her.

Q. Well, in the ordinary . . .

THE COURT: I sustain.

MR. FLANNERY: I'll try to cure . . . pardon me, I'll try to cure the objection.

Q. In the ordinary course of business, who would you receive these guidelines from in your office or wherever?

A. Either Debra Freeman, in my office, or over the phone from her words.

Q. And do you recall who informed you about any guidelines relating to length of loans?

A. I just don't remember which one of the two of them told me.

Q. And what do you remember being told?

A. I remember being told that we would take loans for a maximum of eight months.

[144] Q. Do you recall for what reason?

A. I just remember there was some legal advice given to us, but I don't remember any more than that.

Q. Did anybody ever tell you you should register as a broker/dealer?

A. No.

Q. An investment advisor?

A. No.

Q. An agent of a security issuer?

A. No.

Q. Did you register as a broker/dealer?

A. No.

Q. Did any lender ever ask you if you were registered as a broker/dealer?

A. No, no one ever asked me that question.

Q. Did any lender ever tell you that they, themselves, did use brokers?

A. Yeah, I remember some people mentioning conversations with their stockbrokers, that kind of thing.

Q. Do you remember anybody by name, as you sit here?

A. Yeah, Hank Bryant told me about conversations with his stockbroker and John Merrymount told me about [145] a stockbroker. People told me about conversations with their stockbrokers.

Q. Did any supporter or lender ask if these loans were registered with the State Corporation Commission as securities?

A. No, no one ever asked me that question.

Q. Did anybody ask you if the companies were registered as security issuers or anything of the sort?

A. No, no one ever asked me that question.

Q. Did anybody ever ask you for a prospectus of the company that they were lending the money to?

A. No.

Q. Did they ever ask for any kind of financial statement?

A. No.

Q. Did they ever ask for copies of any of the complaints in the cases that you told them about over the phone?

MR. CHABALEWSKI: Excuse me, I'm not clear about what complaints and where and who and when.

Q. Did you make reference in your conversations to any judgments in and around November of 1984 against the [146] companies in the NBC case?

A. Well, there were . . . yes, I made reference to a number of different judgments. There were fines and there was a $256,000 fine, which was part of the originally $3 million fine. In November of '84, yes.

Q. Did anybody ever ask for any copies of those legal pleadings?

A. No.

Q. This information was also distributed in the newspapers and in magazines?

A. Yes, we published all of the information about their NBC case in New Solidarity and EIR.

Q. And when there were $10,000 a day fines against a number of your organizations and you told people about that, did they ask you for copies of the legal pleadings reflecting these $10,000 a day fines?

A. No, but we published . . . we published it in our newspaper. You know, we published the fact that we'd been fined in our newspaper.

Q. Did anybody ask you for copies of the orders banning the books they were supporting that were banned in South America or forbidden from distribution?

A. No. I think we published . . . we published it in [147] our newspaper.

Q. And you discussed it on the phone?

A. Oh, yes, I told everybody about it.

Q. Was there ever a policy in the organization not to repay loans?

MR. CHABALEWSKI: Your Honor, I'm going to object unless there is a statement made by an individual to that effect. This is a negative.

THE COURT: I'll sustain.

Q. Did Mr. Wirtz ever tell you that there was a policy not to repay loans by the organization?

A. No.

Q. Did Debra Freeman ever tell you that?

A. No.

Q. Did Mr. Hintz ever tell you that?

A. No.

Q. Was there every anything in the daily briefings, either written or oral, telling you there was a policy not to repay loans?

A. No.

Q. Did you ever hear anyone who was a member of the organization say there was a policy not to repay loans?

A. No.

* * * *

VIRGINIA:
IN THE CIRCUIT COURT OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA	:
vs.	:
BARBARA M. BOYD	: CRIMINAL NO. 5364
GEORGE R. CANNING	: CRIMINAL NO. 5365
RICHARD E. FREEMAN	: CRIMINAL NO. 5366
ANITA G. GALLAGHER	: CRIMINAL NO. 5367
PAUL GALLAGHER	: CRIMINAL NO. 5368
FRED HAIGHT	: CRIMINAL NO. 5369, 5379
LAWRENCE M. HECHT	: CRIMINAL NO. 5370
KEITH LEVITT	: CRIMINAL NO. 5371, 5380
DONALD D. PHAU	: CRIMINAL NO. 5372, 5381
MARTHA QUINDE	: CRIMINAL NO. 5373, 5382
STUART ROSENBLATT	: CRIMINAL NO. 5374, 5383
DAVID M. SHAVIN	: CRIMINAL NO. 5375
RICHARD E. WELSH	: CRIMINAL NO. 5376
KATHY BROUS WOLFE	: CRIMINAL NO. 5377
CAMPAIGNER PUBLICATIONS, INC.	: CRIMINAL NO. 5378
CAUCUS DISTRIBUTORS, INC.	: CRIMINAL NO. 5379
EXECUTIVE INTELLIGENCE REVIEW	: CRIMINAL NO. 5380
FUSION ENERGY FOUNDATION	: CRIMINAL NO. 5381
PUBLICATION & GENERAL MANAGEMENT	: CRIMINAL NO. 5382

ORDER

The 30th day of March, 1989, the Court considered these cases *sua sponte*, and it appearing to the Court that in the case of a co-defendant, *Commonwealth v. Billington*, Criminal Nos. 5363 and 5978, this Court did grant that defendant's Motion for Change of Venue on the finding that extreme difficulty had been encountered by the Court in empaneling a jury and alternates free from exception in the case of *Commonwealth v. Ascher*, Criminal Nos. 5362 and 5977, due to the necessity to examine upon their *voir dire* approximately one hundred fifteen veniremen over seven days.

And it further appearing that the Defendants herein have heretofore filed Motions for Change of Venue which the Court deferred for later hearing, but that the said motions, for the same reason such motion was granted in *Billington*, should be now granted, it is so ORDERED.

The Court having been advised this 30th day of March, 1989, by the office of the Executive Secretary of the Supreme Court of Virginia that a Judge of the Circuit Court of Roanoke County has agreed to preside in these cases, it is ORDERED that these cases be transferred for further proceedings to said Court, and pursuant to the provisions of Code Section 19.2-253, the Clerk of this Court shall certify copies of the recognizances herein and the record to the Clerk of the Circuit Court of Roanoke County at Salem, Virginia.

The defendants shall appear before this Court on or before 20 April, 1989, at 10:00 A.M., and execute recognizances to appear before the Circuit Court of Roanoke City on 22 May, 1989, at 2:00 P.M. in Courtroom 3, to answer for the offenses for which they have been indicted herein.

Let a copy of this Order be mailed to counsel, and to the Clerk of the Circuit Court of Roanoke County, and certified to the Supreme Court of Virginia.

ENTER: 12 April, 1989

Carleton Penn, Judge Designate

A Copy - Teste
F.R. Howard, Clerk
By: John Fishback

Code of Virginia

[§ **13.1-501.**] Definitions.—When used in this chapter, unless the context otherwise requires:

(a) "Commission" means the State Corporation Commission of Virginia.

(b) "Agent" means any individual who, as a director, officer, partner, associate, employee or sales representative of a broker-dealer or issuer, effects or undertakes to effect sales of securities, otherwise than on behalf of an issuer offering a security exempted by clause (1), (2), (3), (4), (7), (10) or (11) of § 13.1-514(a).

(c) "Broker-dealer" means any person engaged in the business of selling any type of security other than an interest or unit in a condominium as defined in § 55-79.2(c) of the Code of Virginia or cooperative housing corporation for the account of others or for his own account otherwise than with or through a broker-dealer or agent, but does not include a bank, a trust subsidiary formed under § 6.1-32.1 et seq., an issuer or an agent.

(d) "Guaranteed" means guaranteed as to payment of principal, interest or dividends.

(e) "Issuer" means any person who issues or proposes to issue a security, except that

(1) With respect to certificates of deposit, voting trust certificates or collateral trust certificates, and with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of manager;

(2) With respect to equipment trust certificates or like securities "issuer" means the person by whom the equipment is or is to be used;

(3) With respect to oil, gas or other mineral leases, rights or royalties or interests therein, "issuer" means the owner of any such lease, right, royalty or interest (whether whole or fractional) who creates fractional interests therein for the purpose of offering to more than five persons.

(f) "Nonissuer distribution" means any transaction not directly or indirectly for the benefit of the issuer.

(g) "Person" means an individual, a partnership, a corporation, an unincorporated association, a government, a subdivision of a government or a trust in which the interests of the beneficiaries are evidenced by securities.

(h)(1) The term "sale" or "sell" includes every contract of sale of, contract to sell, or disposition of a security or interest in a security for value.

(2) The term "offer" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(3) For the purposes of Article 4 (§ 13.1-507 et seq.) of this chapter the terms defined in this subsection shall not include negotiations or agreements between the issuer and any underwriter or among underwriters; or any transaction by the pledgee of a security unless made directly or indirectly for the benefit of the issuer.

(4) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing shall be deemed to constitute part of the subject of such purchase and to have been offered and sold for value.

(5) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same issuer or of another person, and every sale or offer, of a security which gives the holder thereof a present or future right or privilege to convert such security into another security of the same issuer or of another person, shall be deemed to include an offer of such other security.

(i) "Securities Act of 1933," "Securities Exchange Act of 1934" and "Investment Company Act of 1940" mean the federal statutes of those names as now or hereafter amended.

(j) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate of subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Provided, however, that this definition shall not apply to any insurance policy, endowment policy, annuity contract, variable annuity contract or any contract or agreement in relation to and in consequence of any such policy or contract, issued by an insurance company subject to the supervision or control of the Commission's Bureau of Insurance when the form of such policy or contract has been duly filed with the Bureau as now or hereafter required by law.

* * * *

[**§ 13.1-502.**] Unlawful offers and sales.—It shall be unlawful for any person in the offer or sale of any securities, directly or indirectly,

(1) To employ any device, scheme or artifice to defraud, or

(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser.

[§ **13.1-504.**] Registration.—(a) It shall be unlawful for any person to transact business in this Commonwealth as a broker-dealer, investment advisor or as an agent, except in transactions exempted by subsection (b) of § 13.1-514, unless he is so registered under this chapter.

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[§ **13.1-507.**] Registration requirement.—It shall be unlawful for any person to offer or sell any security unless the security is registered under this chapter or the security or transaction is exempted by this chapter.

[§ **13.1-520.**] Crimes.—A. Any person who shall knowingly and willfully make, or cause to be made, any false statement in any book of account or other paper of any person subject to the provisions of this chapter, or knowingly and willfully exhibit any false paper to the Commission, or who shall knowingly and willfully commit any act declared unlawful by this chapter, with the intent to defraud any purchaser of securities or with the intent to deceive the Commission as to any material fact for the purpose of inducing the Commission to take any action or refrain from taking any action pursuant to this chapter, shall be guilty of a Class 4 felony.

B. Any person who shall knowingly make or cause to be made any false statement in any book of account or other paper of any person subject to the provisions of this chapter or exhibit any false paper to the Commission or who shall commit any act declared unlawful by this chapter shall be guilty of a misdemeanor, and on conviction, be punished by a fine of not less than $100 nor more than $5,000, or by confinement in jail for not less than 30 days nor more than 1 year, or by both such fine and imprisonment.

* * * *

[§ **18.2-22.**] Conspiracy to commit felony.—(a) If any person shall conspire, confederate or combine with another, either within or without this Commonwealth, to commit a felony within this Commonwealth, or if he shall so conspire, confederate or combine with another within this Commonwealth to commit a felony either within or without this Commonwealth, he shall be guilty of a felony which shall be punishable as follows:

(1) Every person who so conspires to commit an offense which is punishable by death shall be guilty of a Class 3 felony:

(2) Every person who so conspires to commit an offense which is a noncapital felony shall be guilty of a Class 5 felony; and

(3) Every person who so conspires to commit an offense the maximum punishment for which is confinement in a state correctional facility for a period of less than five years shall be confined in a state correctional facility for a period of one year, or, in the discretion of the jury or the court trying the case without a jury, may be confined in jail not exceeding twelve months and fined not exceeding $500, either or both.

(b) However, in no event shall the punishment for a conspiracy to commit an offense exceed the maximum punishment for the commission of the offense itself.

(c) Jurisdiction for the trial of any person accused of a conspiracy under this section shall be in the county or city wherein any part of such conspiracy is planned or in the county or city wherein any act is done toward the consummation of such plan or conspiracy.

(d) The penalty provisions of this section shall not apply to any person who conspires to commit any offense defined

in Chapter 34 of Title 54.1 or of Article 1 (§ 18.2-247 et seq.), Chapter 7 of this title.

The penalty for any such violation shall be as provided in § 18.2-256.

United States Code

Title 15, U.S.C., § 77b

When used in this title [15 USCS §§ 77a et seq.] unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * *

Title 15, U.S.C., § 77x. Penalties.

Any person who wilfully violates any of the provisions of this title [15 USCS §§ 77a et seq.], or the rules and regulations promulgated by the Commission under authority thereof, or any person who wilfully, in a registration statement filed under this title [15 USCS §§ 77a et seq.], makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.

7B, U.L.A., § 401. [Definitions]

When used in this act, unless the context otherwise requires:

. . .

(l) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay [a fixed sum of] money either in a lump sum or periodically for life or for some other specified period.

* * * *

7B, U.L.A., § 409. [Criminal Penalties]

(a) Any person who willfully violates any provision of this act except section 404, or who willfully violates any rule or order under this act, or who willfully violates section 404 knowing the statement made to be false or misleading in any material respect, shall upon conviction be fined not more than $5,000 or imprisoned not more than three years, or both; but no person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order. . . .

Constitution of the United States of America

Amendment 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for ob-

taining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.